NOTES

Restraints on American Communist Activities

Wartime friendship with the Soviet Union has been succeeded by two and a half years of uneasy association. Whereas the appearances of compatibility have to a certain extent been retained in international concourse, the revival of pre-war antipathy and open hostility have marked relations with the Communist Party in the United States. The press reports daily on the development of techniques designed to reduce the power, influence, and extent of communist [1] activity in this country, techniques notable for the variety of legal, economic, social, and psychological pressures brought to bear on a single segment of the American people. It is the purpose of this note to analyze these devices, to observe proposals for the application of more stringent pressures, and to evaluate them in the light of their concordance with American ideas as to the interplay of diverse social thought, their political efficacy, and their social desirability.

MOTIVATIONS

As the attacking front against communism is broad, it is but natural that the motivations of such attack should be heterogeneous. A fundamental approach to the problem is that which sees in communist activity a danger to national security. Knowledge of past revolution and of present-day riot in the foreign arena, lead to disbelief in the party's disavowal of intention to resort to force and violence in this country.[2] A broad current of intuition lies at the bottom of the definition of the party as an "agent of a foreign power," *i. e.,* joined by subtle ties to an international communist organization—the Third Internationale or the Cominform—or to the communist rulers of the Soviet Union. Thus the presence of communists in government agencies is thought to lay us bare to "fifth column" activity in the contingency of a war;[3] the presence of communists in the labor movement serves as a disruptive potential in the event of the necessity of war production.[4]

Contrasted with those whose attitudes are prompted by national interest is the opponent whose anti-communism serves as a front for personal views inimical to democratic institutions, who makes of his picture of the communist the scapegoat for his own political and sociologic shortcomings.[5] There is the anti-communist whose particular political theory equates com-

1. The term "communism" embraces a variety of political and economic faiths, and as such is scarcely capable of useful definition. Since the current uneasiness in this country toward "communism" emanates from a feeling of distrust of the Soviet Union, and since the Communist Party of the United States is connected in popular thought directly or otherwise with Soviet communists, the term as used in this note refers to this party and its peculiar social doctrines.

2. CONST., COMMUNIST PARTY, U. S. A., Art. IX, § 2 (1947): "Adherence to or participation in the activities of any clique, group, circle, faction or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy, whereby the majority of the American people can maintain their right to determine their destinies in any degree, shall be punished by immediate expulsion." See also DENNIS, IS COMMUNISM UN-AMERICAN? 7 (1947).

3. CHAMBER OF COMMERCE OF THE UNITED STATES, COMMUNISTS WITHIN THE GOVERNMENT 9 (1947).

4. See CHAMBER OF COMMERCE OF THE UNITED STATES, COMMUNISTS WITHIN THE LABOR MOVEMENT (1947).

5. See 93 Cong. Rec. 1181 (Feb. 18, 1947); *Hearings Before Committee on Un-American Activities on H. R. 1884 and H. R. 2122,* reported in 93 Cong. Rec. A2142, A2147 (May 1, 1947).

munism with "liberalism" or "new dealism," [6] whose encouragement of anti-communist activity springs from a desire to forestall the possibility of drastic economic change in the event of a repetition of depression conditions,[7] to give meanwhile a unity to political and economic thought and action,[8] and to create conformity to personally favored norms of social conduct. This latter attitude has been decried as advertisement of an unsureness of the validity of democracy as a political form,[9] as a declaration of political insolvency.[10] The indictment is strong, but justifiably so, since the truth remains that experimentation with political forms and economic methods is not forbidden to the American people. Difficult to delineate are other motivations on the psychological level, religious antipathies to a dogma whose background is anti-religious,[11] an almost mystical feeling that association with or toleration of the communist is a contaminating process. Out of the welter of such motivations have sprung the various techniques and proposals hereafter discussed.

The Criminal Sanction

Introduction: The most obvious and most easily understood method of attack against the Communist Party is to declare in simple terms that it is a crime to be a party member. To that effect was *H. R. 2122* proposed during the last session of Congress. It stated: "It shall be unlawful for any individual to be a member of the Communist Party, or of any organization known by him to be—(a) an organization the purpose or aim of which, or one of the purposes or aims of which, is the establishment, control, conduct, seizure, or overthrow of Government in the United States or in any State or political subdivision thereof, by the use of force or violence. . . ." [12] The phraseology of this bill should be observed in the light of those existing statutes, state and federal, which are directed at left-wing or radical activity. With the exception of the short-lived Alien and Sedition Laws [13] and the constitutionally based crime of treason,[14]

6. *The Constitutional Right to Advocate Political, Social and Economic Change—An Essential of American Democracy,* 7 Law. Guild Rev. 57, 66 (1947). Congressional criticism of this attitude appears in 93 Cong. Rec. 2219 (March 17, 1947); 93 Cong. Rec. 2540 (March 24, 1947).

7. 93 Cong. Rec. 574 (Jan. 23, 1947).

8. *Id.* at 568, where Mr. Thomas, Chairman of the Committee on Un-American Activities, makes a point that the idea of the portal-to-portal pay suit was the brain child of a communist labor leader.

9. Knepper, *Should We Outlaw the Communist Party?* 107 Forum 497 (1947).

10. Commager, *Who Is Loyal to America?* 195 Harper's 193 (1947).

11. Proposed H. Res. 99, 80th Cong., 1st Sess. (1947) is illustrative in part of this feeling: *"Resolved,* That communism be defined and declared to be not a political policy, but is an international conspiracy and an anti-Christian ideology which advocates and practices deceit, confusion, subversion, revolution, and the subordination of man to the state, and which has for its purpose and intention the overthrow of any democratic form of government by force and violence, if necessary. . . ."

12. H. R. 2122, § 2, 80th Cong., 1st Sess. (1947).

13. The Alien Law, Act of June 25, 1798, 1 Stat. 570 (1848), declared it "lawful for the President of the United States at any time during the continuance of this act, to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States. . . ." The Sedition Law, Act of July 14, 1798, 1 Stat. 596 (1848), provided: "That if any person shall write, print, utter or publish . . . any false, scandalous and malicious writings against the government of the United States . . . with intent to defame the said government . . . or to stir up sedition within the United States . . . then such person . . . shall be punished . . . ." Both statutes, by their terms, expired in 1800.

14. U. S. Const., Art. III, § 3; 35 Stat. 1088 (1909), 18 U. S. C. § 1 (1940).

legislation aimed at anti-government forces was virtually non-existent prior to the period of World War I. During this era the progenitors of legislation aimed directly at communist activity were themselves born. Parallel lines of development and considerable background law stem from the Espionage Act of 1917 [15] and the state syndicalist statutes.[16]

Espionage, Syndicalism, and Sedition: The Espionage Act of 1917, expressly made operative only in time of war, was directed at those who made false reports with intent to interfere with the military forces or to promote the success of the enemies of the United States, or who wilfully caused or attempted to cause insubordination in the military forces, or who obstructed recruiting. Such a statute could obviously be directed to the use of words as well as to those more overt physical manifestations commonly qualifying as "acts" subject to the strictures of the criminal law. It was directed in such a manner and, despite the interposition of the defense of conflict with the First Amendment, was unanimously declared constitutional in *Schenk v. United States.*[17] The equation of words, in some situations, with acts, the now familiar "clear and present danger" dictum,[18] and the apparent finding of such danger in the *Schenk* case, as well as in the *Frohwerk* and *Debs* cases,[19] established that control over speech was in some measure permissible.[20] The 1918 amendments to the act illustrated the extent to which the Supreme Court would permit Congress to go in interdicting the discussion of governmental matters in wartime,[21] although their application in the case of *Abrams v. United States* [22] called forth a dissent by Justice Holmes and another exposition of the "clear and present danger" rule.[23]

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15. 40 STAT. 219 (1917), 50 U. S. C. § 33 (1940).

16. See statutes cited note 24 *infra.*

17. 249 U. S. 47 (1919).

18. Schenk v. United States, 249 U. S. 47, 52 (1919). The caution of Justice Holmes, however, in stating that state action against speech would be curtailed until the point of danger had been reached, was weakened by the remainder of the "rule" he declaimed: *i. e.,* danger "that will bring about the substantive evils Congress has a right to prevent." The determination of the comprehension of this right is by its very nature a variable process, involving a relativity between the action—the words used—and that which can be prevented, which depends largely upon a subjective analysis of the social situation by the judge as well as by the jury.

19. Frohwerk v. United States, 249 U. S. 204 (1919); Debs v. United States, 249 U. S. 211 (1919); *see* Masses Pub. Co. v. Patten, 246 Fed. 24 (C. C. A. 2d 1917), *reversing,* Masses Pub. Co. v. Patten, 244 Fed. 535 (S. D. N. Y. 1917). The district court opinion of Judge Learned Hand in the *Masses* case was, for its period, a remarkably restrained application of the Espionage Act. Although he did not find the act unconstitutional, Judge Hand was unable to find that the criticisms embraced in the cartoons and publications constituted a violation of the statute.

20. The classic study of the First Amendment and its development in the courts is CHAFEE, FREE SPEECH IN THE UNITED STATES (1920 and 1941).

21. 40 STAT. 553 (1918). The amendments extended the 1917 provision so that it should include, *inter alia,* prohibition of publishing disloyal language about the form of government in the United States, or the Constitution, military or naval forces, flag, uniform of the army and navy; of language bringing these institutions into contempt; of utterances advocating curtailment of production with intent to cripple the prosecution of the war. These amendments were repealed and the act restored to its 1917 version by 41 STAT. 1359 (1921).

22. 250 U. S. 616 (1919).

23. The 1917 Espionage Act is still in force. It was used to prosecute members of the German "fifth column" during World War II. *See* United States v. Pelley, 132 F. 2d 170 (C. C. A. 7th 1942), *cert. denied,* 318 U. S. 764 (1942).

With assurance that seditious language could support criminal conviction, the states found themselves prepared at the conclusion of the war to extend the theory of federal sedition legislation to apply in peacetime, by adoption of the so-called syndicalist statutes.[24] By their terms they were designed to protect not only property and industrial ownership and control, but also the existence of the state. Protection was to be afforded by the statutes against force and violence, against advocacy and teaching of such force and violence, and against organization for those purposes.[25] Although aimed largely at the Industrial Workers of the World, a left-wing group advocating industrial unionism and espousing revolutionary theories,[26] the statutes were early directed against activities of the Communist Party and its adherents.[27] Enforcement was marked by a willingness to apply sanctions even in the absence of a patent and imminent danger [28] and at times when the existence of even a reasonable tendency to endanger the state was in doubt.[29] More recently, however, *DeJonge v. Oregon* [30] and *Herndon v. Lowry* [31] have halted this trend and have required a finding of effective promulgation of revolutionary doctrine and incitement to anti-social action as a prerequisite to conviction under such statutes.

The combination of federal sedition laws for wartime control and of state syndicalist laws for peacetime control of "left-wingers" paved the way for the federal government in 1940 to attach a peacetime sedition law

24. CAL. GEN. LAWS, Act 8428 (Deering, 1944); ILL. ANN. STAT., c. 38, § 558 (Smith-Hurd, 1935); OHIO GEN. CODE, § 13421-23 through § 13421-26 (Page, 1938); PA. STAT. ANN., tit. 18, § 4207 (Purdon, 1945); UTAH CODE ANN., tit. 103, c. 54 (1943); WASH. REV. STAT. ANN., § 2563-1 (Remington, 1932). Note the similarity to these statutes of a recent act passed in Alabama: H. B. 339, approved Oct. 9, 1947, is directed at those advocating overturning the government by force and violence, but is more obviously than the foregoing statutes aimed at the Communist Party, through its declaration that any organization advocating the prohibited activities "shall be denied all rights as a political party, may be dissolved and enjoined from carrying on its illegal objective, and shall not be permitted to meet and function in the State of Alabama. . . ."

25. The statutes were held constitutional as a valid exercise of the states' police powers. See State v. Kassay, 126 Ohio St. 177, 184 N. E. 521 (1932). See also Note, *Criminal Syndicalism and the Civil Liberties,* 36 ILL. L. REV. 357, 358, n. 10 (1941), for a recitation of the constitutional arguments advanced against this legislation and rejected by the courts.

26. See 2 MORISON AND COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 556-565 (1942), for a discussion of the post World War I program against all leftist and radical activities, a program including the enforcement of the state syndicalist statutes.

27. People v. Lloyd, 304 Ill. 23, 136 N. E. 505 (1922) (statute enforced against founders of Communist Labor Party); *see also* Whitney v. California, 274 U. S. 357 (1927) (conviction of a woman present at an organizational meeting of Communist Party, although she had, during early stages of meeting, introduced a resolution favoring an evolutionary rather than a revolutionary program for the party).

28. State v. Boloff, 138 Ore. 568, 4 P. 2d 326 (1931).

29. See CHAFEE, FREE SPEECH IN THE UNITED STATES 180 (1941).

30. 299 U. S. 353 (1937).

31. 301 U. S. 242 (1937). This case arose under a Georgia statute making it a crime to induce joining in a combined resistance to the lawful authority of the state. The defendant was a Communist Party organizer and had been convicted of violating the statute by his attempt to bring negroes into the party. Note also the application of the Iowa syndicalist statute to a communist labor leader in a strike situation. The Iowa supreme court reversed a conviction under the type of statute which lumped under the aims of criminal syndicalism industrial as well as political reforms. State v. Sentner, 230 Iowa 592, 298 N. W. 813 (1941).

as a rider to the Alien Registration Act of that year.[32] In terms the familiar syndicalist language makes its appearance.[33] The constitutionality of this statute was upheld by a circuit court in *Dunne v. United States*,[34] a prosecution of Trotskyite socialists during the war years, though it is to be noted that the defendants were convicted not only under the peacetime sedition sections of the statute but also under that portion of the statute interdicting the undermining of loyalty in the armed forces.

It is against this background of state and federal legislation aimed at activities deemed productive of revolution that *H. R. 2122* must be read. It would appear that that portion of the House bill heretofore set forth does little more than restate the 1940 act and would stand or fall according to the eventual constitutional fate of the pre-war measure. Apart, however, from the constitutional questions involved, there are difficulties in the prosecution of members of the Communist Party under either a version of the 1940 act or under that portion of *H. R. 2122* which does not refer to the Communist Party by name.[35] These difficulties are grounded in matters of proof. To appreciate why there has been no attempt to prosecute party members under the 1940 act, and at least one very important reason why the Committee on Un-American Activities has not reported an "outlawry" bill to the House, a study is in order of other techniques of long standing in federal circles for suppressing communist activity, techniques developed in the exercise of control over aliens.

Sanctions Attendant upon Deportation and Naturalization: A particularly effective device in the post World War I campaign against communist and other left-wing groups was the power to deport certain undesirable classes of aliens. The Supreme Court had given its consent to the deportation of anarchists early in the century, apparently going so far as to find Congress possessed of the power to exclude those whose antipathy to governments was little more than philosophical.[36] This curtailment of the application of the First Amendment gained added impetus from a conviction that deportation was not a punishment and that therefore the tremendous safeguards attendant upon the administration of the criminal law were not applicable to the deportation of undesirable aliens.[37]

32. 54 STAT. 670, 18 U. S. C. §§ 9-14 (1940).

33. § 10(a) (3) is particularly pertinent in this context: "It shall be unlawful . . . to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliated with, any such society, group, or assembly of persons, knowing the purposes thereof."

34. 138 F. 2d 137 (C. C. A. 8th 1943), *cert. denied*, 320 U. S. 790 (1943). The court expressly repudiated any "vague right of self-preservation in the federal government" and sought to uphold the statute on grounds of express constitutional powers. The peacetime sedition portion of the act was apparently supported, in the court's opinion, by the welfare references contained in the Preamble and in Art. I, § 8, cl. 1. The basis is weak; the court is apparently admitting that the federal government, despite familiar dogma otherwise, is exercising power normally called police power in the states. If and when the Supreme Court adjudicates separately the peacetime sedition sections of the act, it will doubtless seek a firmer constitutional basis. This may possibly lead even to the assertion of police power to preserve its own existence for the purpose of exercising powers undoubtedly possessed.

35. That part of the proposed bill which singles out the Communist Party as such, and makes it a crime to be a member of the party, is a legislative finding of the guilt of a readily determinable class, without the exercise of the judicial function. This may come within the modern concept of the "bill of attainder" enunciated in United States v. Lovett, 328 U. S. 303 (1946).

36. United States *ex rel.* Turner v. Williams, 194 U. S. 279 (1904).

37. Mahler v. Eby, 264 U. S. 32 (1924).

Out of the numerous cases arising from raids upon left-wing meetings during the early twenties,[38] there unfolded a pattern to be followed in "convicting" the alien of prohibited activity.[39] At the deportation hearing, evidence was introduced to demonstrate the alien's membership in the Communist Party [40] or in a left-wing group,[41] or his "affiliation" with the Communist Party.[42] Thereupon evidence was offered to the effect that this group advocated the overthrow of the government by force: evidence consisting of communist documents going back to the 1848 Manifesto and the more recent writings of Lenin and Stalin.[43] Later, courts in reviewing such evidence of the party program accepted the argument that it was unnecessary to look too deeply into the matter; the question had been settled so frequently that they felt they could take judicial notice of the party's "subversive" characteristics.[44] Occasionally voices were heard demanding greater probative standards. One asserted that judicial notice could not be taken of the party's purposes or methods because of the absence of definite proof;[45] another, that random association with communists was not a sufficient indication of "affiliation" with the organization to satisfy the requirements of the controlling statute.[46]

Parallel to the deportation cases are those instances wherein action is taken against a naturalized citizen to cancel his naturalization certificate, on grounds of fraudulent or illegal procurement. Proof of belief in philosophical anarchy has been held sufficient for such cancellation;[47] statements of communistic belief in a private letter have been held to satisfy the requirement that the alien be shown to have falsely alleged that he was attached to the principles of the Constitution.[48]

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38. See CLARK, DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE 220 *et seq.* (1931).

39. The statutes currently applicable to this situation are: (1) 40 STAT. 1012 (1918), as amended, 8 U. S. C. § 137 (1940), which provides that aliens of specified classes shall be excluded or deported, *i. e.*, anarchists; members of organizations advocating opposition to organized government; those who believe in or belong to organizations advocating overthrow of the government, assault on government officers, or sabotage; those who belong to organizations publishing advocacy of the proscribed activities; and (2) 39 STAT. 889 (1917), 8 U. S. C. § 155 (1940), which provides for deportation of undesirable aliens in general, including the foregoing specifically named classes.

40. United States *ex rel.* Vojewvic v. Curran, 11 F. 2d 683 (C. C. A. 2d 1926), *cert. denied sub nom.* Vojnovic v. Curran, 271 U. S. 683 (1926); Skeffington v. Katzeff, 277 Fed. 129 (C. C. A. 1st 1922).

41. Murdoch v. Clark, 53 F. 2d 155 (C. C. A. 1st 1931) (membership in Workers' Party of America, National Textile Workers' Union, and the Trade Union Unity League).

42. Wolck v. Weedin, 58 F. 2d 928 (C. C. A. 9th 1932) (alien not a member of the Communist Party "because he was not intelligent enough," but proved that he was sympathetic with the party's aims, joined the Unemployed Council—indirectly associated with the party—and contributed money to the party).

43. United States *ex rel.* Lisafeld v. Smith, 2 F. 2d 90 (W. D. N. Y. 1924); Antolish v. Paul, 283 Fed. 957 (C. C. A. 7th 1922); Skeffington v. Katzeff, 277 Fed. 129 (C. C. A. 1st 1922); United States *ex rel.* Abern v. Wallis, 268 Fed. 413 (S. D. N. Y. 1920).

44. Murdoch v. Clark, 53 F. 2d 155 (C. C. A. 1st 1931); United States *ex rel.* Fortmueller v. Comm'r of Immigration, 14 F. Supp. 484 (S. D. N. Y. 1936); *see* Ungar v. Seaman, 4 F. 2d 80 (C. C. A. 8th 1924) (judicial notice taken of party program, but deportation not ordered because of denial of due process in the hearing).

45. *Ex parte* Fierstein, 41 F. 2d 53 (C. C. A. 9th 1930).

46. United States *ex rel.* Kettunen v. Reimer, 79 F. 2d 315 (C. C. A. 2d 1935).

47. United States v. Stuppiello, 260 Fed. 483 (W. D. N. Y. 1919).

48. United States v. Tapolcsanyi, 40 F. 2d 255 (C. C. A. 3d 1930).

The parallel development of these cases reached a new stage during the recent war when the Supreme Court decided both a deportation case and a controversy involving the cancellation of naturalization, in each situation favorably to the alien. *Bridges v. Wixon* [49] concluded a seven-year program in the courts to deport the West Coast labor leader. The Attorney General had made the usual findings of the alien's membership in the party and of the party's advocacy of overthrow of the government by force, and had ordered the deportation. Studiously avoiding decision of the issue whether the party advocates the overthrow of the government by force,[50] the Supreme Court found that there had been no proof of membership in or affiliation with the party, and that Bridges' association with the party had been a mere matter of expediency, and ordered his release. In view of the fact that this result required a reversal of the Attorney General's findings, expressly declared by statute to be conclusive,[51] the holding is rather strong to the effect that hangers-on to the communist fringe are not proved to advocate overthrow of the government by the exercise of forceful means. In the denaturalization field, *Schneiderman v. United States* [52] attacked the principle of "guilt" by mere association. It was sought to be proved that Schneiderman had not been attached to the principles of the Constitution at the time of his naturalization. Again avoiding the determination of the issue whether the party advocates violent overthrow of the government, despite the mass of documentary evidence offered to prove this "fact," [53] the Court held that the United States could not prove by Communist Party membership alone that this individual believed in social theories unacceptable under our Constitution.

Evaluation of the Criminal Sanction: It would appear then, that the pattern of proof of party membership and party program will not suffice to satisfy even the "non-penal" categories of alien control. The *Dunne* case [54] under the 1940 act, while seemingly pointing in that direction, no doubt (in the light of the Supreme Court's treatment of the two foregoing cases) stands alone, and can be explained either by the Court's desire to support the act in toto, or by the fact that the Trotskyite defendants had engaged in activity clearly undermining the government's exercise of admitted war powers. The phrasing of *H. R. 2122,* requiring merely membership in an organization whose known tenets include physical political revolution, may be an attempt to establish this pattern legislatively, in order to escape the necessity of proving individual advocacy or incitement of revolution. It would appear, however, in view of the fact that the bill is admittedly a criminal measure, that such an effort would be subject to an even greater extent to the limitations of the *Bridges* and *Schneiderman* cases than the deportation and naturalization situations themselves. The task, then, of attaching personal guilt to even a substantial portion of some 75,000 [55] communists in this country on the basis of their personal advocacy of force

49. 326 U. S. 135 (1945).

50. But see Mr. Justice Stone, dissenting, *id.* at 166, 168, where he remarks that the hearing judge found the party an organization advocating overthrow of the government by force, which finding he does not find challenged in this case.

51. 39 STAT. 889 (1917), as amended, 8 U. S. C. § 155 (1940).

52. 320 U. S. 118 (1943).

53. *Id.* at 148.

54. Dunne v. United States, 138 F. 2d 137 (C. C. A. 8th 1943), *cert. denied,* 320 U. S. 790 (1943). See p. 385 *supra.*

55. See 93 Cong. Rec. A1098 (March 17, 1947) for a comparative estimate of Communist Party strength in America and elsewhere.

and violence would be virtually impossible. This may well be a deterrent to the passage of such a statute. Also to be noted is that the fear of communist activity is not limited to concern over operations of party members. Those who would wage a thorough attack on communists are constrained to consider the so-called "fellow-traveler," who is not a member of the party organization but is in one way or another associated with the organization and its ideologies. The utter impossibility, under the statutory situation heretofore discussed, of successfully immunizing society from this latter influence is readily apparent.[56] From the standpoint of the efficacy of such a program the direct criminal sanction is likely to receive little support. Canadian experience with the program of so-called "outlawry" has been eminently unsuccessful,[57] and testimony before the House Un-American Activities Committee has voiced the opinion that prohibition of party membership would not accomplish the purposes thought necessary.[58] Accordingly there have been developed more specialized and withal more indirect methods of undermining Communist Party leadership.

The Electoral Sanction

H. R. 1884, also introduced in the last session of Congress, proposed in part that: "It shall be unlawful for an individual to file as a candidate for, or otherwise attempt to secure election to, any Federal or State elective office (1) as the candidate of the Communist Party, or (2) if such individual is a member of the Communist Party." [59] This rather bold designation of the Communist Party by name is the culmination of a program developed within the states to keep the party off the ballots. The method commonly resorted to prior to World War II was the indirect attack aimed at nomination petitions circulated by the party.[60] New York denied ballot position to the party in 1940 upon a finding that the required number of signatures had not been appended to the petition from one county of the state.[61] The same year, Pennsylvania made similar findings of fraud in

56. *See* Bridges v. Wixon, 326 U. S. 135 (1945); United States *ex rel.* Kettunen v. Reimer, 79 F. 2d 315 (C. C. A. 2d 1935).

57. Letter, L. H. Phillips, professor of political science, Colo. State College of Education, N. Y. Times, May 11, 1947, § 4, p. 8E, col. 6, citing the "outlawry" experience in Canada and asserting that criminal sanctions against party membership did not work to forestall the operations of an espionage ring whose apprehension was effected only through the operation of federal espionage laws already in existence.

58. See *Hearings Before Committee on Un-American Activities on H. R. 1884 and H. R. 2122,* 80th Cong., 1st Sess., reported in 93 Cong. Rec. 2142, 2144 (May 1, 1947).

59. § 3(a) of the bill. § 2 defines the Communist Party as "the political party now known as the Communist Party of the United States of America, whether or not any change is hereafter made in such name." § 3(b) of the bill, making it criminal for a teacher to "convey the impression of sympathy with or approval of, communism or Communist ideology," goes so far outside the heretofore permissible limits of control over freedom of speech, that it is to be wondered whether its sponsor, Mr. Rankin, seriously envisaged the passage of such a bill. On the other hand, a purpose would no doubt be served by the introduction of bills even of this nature, namely, the preservation of appearances on the part of the Un-American Activities Committee of consideration of possible future legislation.

60. Positions on the ballot are not accorded to a party as of right. Formal requirements are such that minority parties are frequently unable to have their candidates considered by the electorate. The two principal requirements are the receipt of a prescribed number or percentage of votes at a preceding election, or the filing of a nomination petition with a specified number of signatures. See American Civil Liberties Union, Minority Parties on the Ballot (1943).

61. Matter of Connell (Bedacht), 284 N. Y. 164, 29 N. E. 2d 973 (1940).

the procurement of signatures to nominating petitions, and banned the party from the ballot.[62] The secretary of state of Washington refused to perform the ministerial function of filing the certificate of nomination submitted by the party, relying on the deportation cases and asserting that "it was a matter of common knowledge that the party advocated overthrow of the government by force." The state supreme court, however, refused to permit denial of ballot position to be based upon such judicial notice of party purposes.[63] It has been stated that in one pre-war national election, the Communist Party was ruled off the ballot, by executive order or by the courts, in some fifteen states.[64] Charges of fraud have not only the effect of banning the party from the ballot but of searching out party leaders and subjecting them to jail sentences.[65]

A device which hits more squarely at the Communist Party, and which is not dependent upon a finding of fraud for its success, is the statute which denies the use of the ballot to certain designated groups. Arkansas and Tennessee had such statutes for several years before the war.[66] A rash of statutes appearing in 1941 exhibited common features: those parties will not be permitted to appear on the ballot (a) which are directly or indirectly affiliated with the Communist Party, the Third Internationale, or any other foreign agency, political party, organization, or government; (b) which advocate, teach, or justify overthrow of the government by force or violence.[67] An additional wrinkle in some states is the requirement of the filing of an affidavit by the officers of a party or by the candidate that the party or the candidate will support the constitution, does not advocate overthrow, or is not affiliated with a proscribed party.[68] The cases construing and applying these statutes have been few and, to a certain extent, inconclusive. The Ohio non-communist affidavits were declared constitutional as being a reasonable classification by the state.[69] The party was denied a writ of mandamus in Arkansas to compel placing the names of its candidates on the ballot, the court upholding the Arkansas statute as well as the secretary of state's *ex parte* determination, supported to the court's satisfaction by the old "deportation" evidence of party publications to the

62. Criminal convictions growing out of the procurement of signatures to nominating petitions for the 1940 elections were affirmed in Commonwealth v. Antico, 146 Pa. Super. 293 (1941) (conspiracy to violate election laws: signatures procured by statement that petition was for purpose of keeping America out of war, etc.) and Commonwealth v. Slome, 147 Pa. Super. 449 (1942) (obtaining signatures to nomination petition by false pretences: representation that signatures were desired to help a friend secure work).

63. State *ex rel.* Huff v. Reeves, 5 Wash. 2d 637, 106 P. 2d 729 (1940).

64. *The Communist Party and the Ballot,* 1 BILL OF RIGHTS REV. 286 (1941).

65. Cases cited note 62 *supra; Civil Liberties in the Election Campaign,* 9 INT'L JURID. ASS'N. BULL. 26 (1940); *Minority Parties in the 1940 Elections—The Court Decisions, id.* at 52.

66. ARK. DIG. STAT., § 4910 (Pope, 1937); TENN. ANN. CODE, § 2045.1 (Williams, 1943). Both statutes were orginally enacted in 1935.

67. ILL. ANN. STAT., c. 46, § 7.2 (Smith-Hurd, 1944); IND. ANN. STAT., § 29-3812 (Burns, Supp. 1945); KAN. GEN. STAT., §§ 25-116, 25-117 (Supp. 1941); OHIO GEN. CODE, § 4785-100a (Page, 1945); OKLA. STAT. ANN., tit. 26, § 162b (Supp. 1947); ORE. COMP. L. ANN., vol. 5, § 81-1309 (Supp. 1943); PA. STAT. ANN., tit. 25, § 2831(d) (Purdon, Supp. 1947); TEX. REV. STAT. ANN., art. 2978a (Vernon, Supp. 1947); WIS. STAT., § 5.225 (1943); WYO. COMP. STAT., § 31-1404 (1945); see also CAL. ELECTION CODE, §§ 2540.3, 2540.4, 2540.9, reviewed in Communist Party v. Peek, 20 Cal. 2d 536, 127 P. 2d 889 (1942).

68. Arkansas, Indiana, Ohio, Tennessee, and Texas have such provisions. See statutes cited notes 66 and 67 *supra.*

69. State *ex* Berry v. Hummel, 42 Ohio L. Abst. 40, 59 N. E. 2d 238 (1944); *see also* Johnson v. Sweeney, 140 Ohio St. 279 (1942).

effect that the party advocated the overthrow of the government by force.[70] More recently, the Pennsylvania statute was applied by the Philadelphia County Board of Elections to deny a place on the ballot to the single communist candidate nominated for the 1947 local elections.[71]

California's statute, on the other hand, ran into considerable difficulty.[72] It has the additional provision that no party shall be qualified to participate if it uses the word "communist" or any derivative thereof as a party designation. The court granted that that portion of the statute forbidding the use of the ballot by a group advocating overthrow was constitutional, providing a hearing should be allowed at which a finding of such activity was made. As to the use of the word "communist," the court asserted that the legislature had no power to make an *ex parte,* nonjudicial finding of the subversive characteristics of any specific, named group. In similar manner, the Illinois statute was declared inoperative as to the party, on the ground that reference therein to "communist principles" was either void for uncertainty or unconstitutional as striking at belief in a permissible theory of the common ownership of goods.[73] The court declared most of the statutory tests to be lacking in precision, apparently believing that denial of the use of the ballot should not be made with any less restraint than the denial of personal liberty as a result of the operation of the criminal law.

The language of *H. R. 1884,* it would appear, is far too broad. It is open to constitutional criticism insofar as it purports to regulate in some degree election to state offices.[74] Further, it is aimed at a specified group and contains a legislative finding that this group is not qualified to exercise a political privilege. Such a finding, cutting into the area of untrammeled belief and liberty to speak, should be based upon behavior which is inimical to the well-being of the government. Even under the view of those state courts which hold that the line dividing permitted from prohibited political activity shall be that which separates advocacy of change by peaceful method from such change by physical pressures, caution must be exercised to ascertain that the "advocacy" which is interdicted is productive of more than a remote tendency to bring about revolution. Prohibition of the use of the ballot is a curtailment of the privileges of individual candidates, not merely of the party. This should not be done by way of *ex parte* determination embodied in a legislative finding failing to take into account the personal beliefs and behavior of such individual candidates.

The practical expediency of banning the party from the ballot is doubtful. The values of public political parties of the communist type are immense: the leaders are kept in the public eye; underhanded activity is at least to some extent less likely to occur than if the party were totally

70. Field v. Hall, 201 Ark. 77, 143 S. W. 2d 567 (1940).

71. Phila. Inquirer, Aug. 29, 1947, p. 6, col. 4. The board stated: "The Communist Party and all who belong to it are avowed enemies of our government. They have no right on the ballot and as far as we are concerned, there is no room for them." There was no hearing or finding as to Communist Party purposes, so that the judicial notice device appears to operate in this field also.

72. Communist Party v. Peek, 20 Cal. 2d 536, 127 P. 2d 889 (1942). See 54 HARV. L. REV. 155 (1940).

73. Feinglass v. Reinecke, 48 F. Supp. 438 (N. D. Ill. 1942). But the court's holding was that the party could not be placed on the ballot since there was insufficient time prior to the election in which to prepare new ballots.

74. See Lackey v. United States, 107 Fed. 114 (C. C. A. 6th 1901), where a federal statute designed to regulate state as well as federal elections was declared void as not being within the powers granted to Congress by U. S. CONST., Art. I, § 4, cl. 1, and U. S. CONST. AMEND. XV. See Note, *Limitations on Access to the General Elections Ballot,* 37 COL. L. REV. 86 (1937).

"underground." Likewise, there is a certain anomaly in barring a group from the use of democratic methods on the basis of the fact that the group does not itself use democratic methods. Finally, in the light of the party's political ineptness and the improbability of its gaining public position through the ballot, it seems that this phase of anti-communist activity is only an extreme example of the contamination-by-toleration theory of social relations.

The Loyalty Probe

The inefficacy of the broadside criminal prosecution and the difficulties of proof attendant upon its exercise have been responsible for the evolution of a new technique to provide against what is deemed to be a specific evil from communist activity: danger to national security. The President's executive order,[75] setting up an investigative procedure precedent to possible discharge from the federal service, and the Rees Bill,[76] passed by the House but unsuccessful in the Senate, demonstrate the direction new techniques are taking.

Prior to 1939 no particular provisions were made for determination of the federal employee's attachment or devotion to any particular norm of political or economic belief. The civil service law [77] provided for discharge from the service only for cause, cause to be determined in the light of what would promote the efficiency of the service. The procedure for discharge allowed for notice of charges, and for a reasonable time to answer, but for no examination of witnesses, nor for trial or hearing except in the discretion of the removing officer, nor for review by the Civil Service Commission as a matter of course.[78]

In 1939 the passage of the Hatch Act created new bases for discharge. Besides the more familiar proscription of executive officers' and employees' taking "any active part in political management or in political campaigns," [79] the act also provided that it should be unlawful, *i. e.,* a basis for discharge, for federal employees to have membership in any political party or organization which advocates the overthrow of the constitutional form of government in the United States.[80] However, the act was not resorted to in the notable instance in which concerted governmental action was directed against purportedly communist members of the government service. This was the case of *United States v. Lovett.*[81] A special act of Congress had been passed at the instigation of the Dies Committee, forbidding the expenditure of federal funds to maintain on the payroll certain named individuals purportedly affiliated with communist "front" organizations. A suit in the Court of Claims for salary reached the Supreme Court, which disapproved the special legislation roundly by attaching to it the label of "bill of attainder." The force of the Court's conclusions lies in the fact that the result might have been as easily arrived at from several routes, none of which required such a strong finding of unconstitutionality,[82] but

75. Exec. Order No. 9835, 12 Fed. Reg. 1935 (1947).
76. H. R. 3813, 80th Cong., 1st Sess. (1947).
77. 37 Stat. 555 (1912), 5 U. S. C. § 652 (1940).
78. 5 Code Fed. Regs. § 12.4 (1938).
79. 53 Stat. 1148 (1939), as amended, 18 U. S. C. § 61h (Supp. 1946).
80. 53 Stat. 1148 (1939), 18 U. S. C. § 61i (1940).
81. 328 U. S. 303 (1946).
82. See Mr. Justice Frankfurter, concurring in United States v. Lovett, 328 U. S. 303, 318 (1946). Justice Frankfurter would not have declared the statute unconstitutional, but would have allowed recovery on the ground that Congress merely forbade "disbursing agents of the Treasury to pay out of specifically appropriated moneys sums to compensate respondents for their services," but did not attempt to preclude a recovery in the Court of Claims for work done. *Id.* at 330.

that, notwithstanding, the Court was of the opinion that discharge for the holding of unpopular political views amounted very definitely to a punishment. The result of the application of such a concept to future cases involving "disloyalty discharges" may be to impose a higher standard of judicial proof and procedure than has heretofore been applied in the case of discharge for incompetency.[83]

The term "loyalty" entered the picture with the adoption of the War Service Regulations, which provided that for certain emergency appointments not in the classified civil service, one of the disqualifications for applicants, or for those appointed pending completion of investigation, would be a finding of "a reasonable doubt as to his loyalty to the Government of the United States." [84] This provision received a test in a case involving a temporary, wartime appointee. The employee's request to the courts for reinstatement, after discharge on loyalty grounds, was turned down in the court of appeals,[85] and certiorari denied by the Supreme Court.[86] No particular weight can of course be given to such a denial, but it is at least indicative that the Court will probably not decide this difficult issue of loyalty until presented with a case involving a permanent, not a temporary, employee, and where there has been not just a refusal to accord a job but actual dismissal from the classified service.

Against this background, the President's order [87] sets up a procedure for the discharge of those employees as to whom reasonable grounds exist for belief that the person involved is disloyal to the government.[88] On the authority of the "overthrow" sections of the Hatch Act,[89] a minimum procedure is outlined, providing for investigation of all incoming employees by the Civil Service Commission and investigation of present employees by the departments,[90] and the formation of separate boards within each department to hear loyalty cases. The order provides that the employee shall have a right to a specific statement of charges against him, and the rights to reply in writing, to an administrative hearing, and to appear before the board and present evidence in his own behalf. Appeal from a removal recommendation may be had to the department head and ultimately to a Loyalty Review Board established within the Civil Service Commission. It would appear that to this extent the employee has greater procedural protection than is accorded to the employee discharged for cause.[91] Likewise, there is more opportunity for review of both sides of each case than is provided by the Rees Bill.[92] This bill provides for one

83. A straw in the wind pointing the other way is the result reached in the case of the United Public Workers of America (C. I. O.) v. Mitchell, 330 U. S. 75 (1947), where the discharge provisions of the Hatch Act relating to political activity of public servants were upheld as being a reasonable regulation of the activities of government employees and as not a restriction upon their rights of free speech. The dissenting justices disagreed with the majority on this latter point, Justice Douglas asserting the necessity of applying the "clear and present danger" rule anew to such situations.

84. 5 CODE FED. REGS. § 18.2(c) (7) (Cum. Supp. 1943).

85. Friedman v. Schwellenbach, 159 F. 2d 22 (App. D. C. 1946).

86. Friedman v. Schwellenbach, 330 U. S. 838 (1947).

87. See *The President's Executive Order on Loyalty of Government Employees*, 7 LAW. GUILD REV. 68 (1947).

88. Exec. Order No. 9835, Part V, § 1, 12 FED. REG. 1938 (1947).

89. 53 STAT. 1148 (1939), 18 U. S. C. § 61i (1940).

90. The Federal Bureau of Investigation is one of the sources of information to which investigating bodies are referred, Part I, § 3a, and Part VI, § 1 of the order. An analysis of the Bureau's part in the loyalty check, by Director J. Edgar Hoover, appears in N. Y. Herald Tribune, Nov. 16, 1947, p. 1, col. 2 *et seq.*

91. See p. 391 *supra.*

92. H. R. 3813, 80th Cong., 1st Sess. (1947).

single, independent executive agency, also called a Loyalty Review Board. Preliminary investigation is to be conducted by the Civil Service Commission, to be followed by a complete investigation by the F. B. I. A preliminary finding is to be made by a subordinate board which has only the report of the F. B. I. upon which to base its own finding. A further preliminary finding, still *ex parte,* is to be made by the review board. Only then is provision made for notification to the employee and hearing before the board, at which time the employee is to present his own evidence for the first time to overcome what has become by now almost a presumption of disloyalty. No further provisions are made as to review of the board's ultimate determination of disloyalty.[93] It would appear, therefore, that the procedures of the executive order are at least to be preferred to those presently being proposed to Congress, in that they give the employee an opportunity to have his own case considered in opposition to that of the government at an early stage of the proceedings, with consequently more possibility of review of both sides of the issue thereafter.

However, specific deficiencies in the President's order are revealed in the absence of a requirement that the procedure before the department's loyalty board shall be recorded or that the department boards shall make factual findings to assist the review board in its consideration of the case.[94] Notably absent, for security reasons,[95] are provisions permitting the employee to confront those who have tendered information relative to his loyalty and to cross-examine them. The executive order not only fails to provide for the cross-examination of witnesses but expressly provides [96] that investigative agencies may refuse to disclose the names of informants, likewise for the sake of security. The board is to be furnished with information about the person who has supplied evidence so that it can make an evaluation of the evidence furnished, though it will not be permitted to know the identity of the one supplying such evidence nor be able to exercise fully its own judgment as to its reliability. The safeguarding of the rights of the employee depends therefore not upon an open proceeding but upon the independent judgment of members of investigative agencies empowered to disclose or refuse to reveal the facts at will.

This preference for the *ex parte* proceeding is also observable in the designation of the standards by which employees are to be judged disloyal. Those activities which fall within the criminal law, such as sabotage and treason, are understandable enough. Part V, section 1 (f) provides that there may be considered in connection with a determination of disloyalty "membership in, affiliation with or sympathetic association with any foreign or domestic organization . . . designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United

93. H. R. 3813, § 5.

94. See letter by Chafee, Griswold, Katz, and Scott, N. Y. Times, April 13, 1947, § 4, p. 8E, col. 5, wherein the loyalty program in general, as well as specific procedural deficiencies in the President's order, is subjected to criticism.

95. The rationale is that sources of information as to disloyal employees are to be guarded from public exposure, so that investigative agencies may continue to use these same sources in future cases. It is to be noted that earlier civil service regulations relative to discharge for political activity defended the omission of provisions allowing cross-examination of informants on the ground that the commission did not have a subpoena power, had to rely on voluntary informants, and could not compel their attendance. See 5 CODE FED. REGS. § 1.104(c) (Supp. 1944).

96. Exec. Order No. 9835, Part IV, § 2, 12 FED. REG. 1938 (1947).

States by unconstitutional means." This definition may well be an attempt to avoid the criticism against taking judicial notice of the subversive character of the Communist Party,[97] but some deficiencies are nevertheless apparent. There is a conspicuous absence of standards as to the meaning of "communist," "fascist," "subversive," upon which the Attorney General is to make his decision, even though investigation and determination are provided for.[98] Nothing is said as to the conclusiveness of such determination by the Attorney General.[99] However, since membership in such associations is to be "considered" by the disloyalty-determining boards, it would appear that these boards are in a position to examine de novo the Attorney General's determination. The power granted to the Attorney General seems to be given him in order that he may designate communist front organizations, the members of which could never come up to the requirements of a criminal statute aimed at members of the party by use of the terminology of overthrow by force and violence.[100] Also, the use of the phrase "sympathetic association" is designed to permit inclusion of such groups and thereby avoid the difficulties presented by the *Bridges* case,[101] which delimited the scope of "affiliation" and refused to permit the inclusion of mere association within that term.[102]

The problem to be faced upon the adoption of such procedures as these is the feasibility of safeguarding the security of the nation and at the same time protecting the individual who harbors no design to "sell out" to foreign groups with hostile interests.[103] The accusation is current that the supporter of the right of communists to share equally with others the benefits of civil liberties does little more than excuse all their political sins. It is to be freely admitted, even in the absence of a determination based on proof which would satisfy the criminal law, that there may well be some persons engaged in the federal service whose loyalty is not to this but to a foreign political power. The potentiality of danger from such sources warrants a program designed to eliminate their influence. But though prosecution of communists and fellow travelers may not in all circumstances be a violation of civil rights, such prosecution is at least a *danger* to civil rights, because of the difficulty of making a clear-cut distinction between the shades of political thought which move off to the left into that group which does in fact seek to undermine the American government in favor of a potentially hostile people.[104] Awareness of the necessity of preserving national security should not overshadow an appreciation of this danger to the roots of American social ideology.

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97. See p. 386 *supra.*

98. Exec. Order No. 9835, Part III, § 3, 12 FED. REG. 1938 (1947).

99. See letter cited note 94 *supra.*

100. Letter, N. Y. Times, May 4, 1947, § 4, p. 10E, col. 5: a former deputy chief counsel at the Nuremberg trials compares the procedure in the trial of certain Nazi organizations with the procedure provided for in the executive order to designate proscribed associations. He points out that, at the trials in Germany, notice and hearing were accorded to the organization, as well as to the alleged member, and finds even this safeguard absent in the executive order.

101. Bridges v. Wixon, 326 U. S. 135 (1945).

102. The proposition that a similar clause be included in the Rees bill (H. R. 3813) called forth some of the strongest opposition to the bill in the House. 93 Cong. Rec. 9153 (July 15, 1947).

103. See Schlesinger, *What Is Loyalty? A Difficult Question,* N. Y. Times Mag., Nov. 2, 1947, p. 7, for a discussion of the problem of reconciling these two significant interests.

104. Note the equation of communism with "liberal," "progressive," "radical," and "red" in 93 Cong. Rec. A372 (Jan. 30, 1947).

The direction of investigative procedures should therefore be toward minimizing this danger. Loyalty should be given a more concrete definition in the executive order and in the Rees or other Congressional bills.[105] The designation of proscribed organizations by the Attorney General should be hedged about with procedural safeguards, one of which should be the requirement of a finding supported by evidence that the loyalty standard has not been met by the group under study. The term "sympathetic association" should be dropped, else the burden of handling a phrase so devoid of meaning in itself and so capable of acquiring a variety of meanings in a time of political insecurity will be placed on the Review Board. It should not be incumbent upon the latter to make the law in such important respects.

CONGRESSIONAL INVESTIGATIONS

Recent investigations conducted by the House Committee on Un-American Activities into the operations of communists in the motion picture industry brought again to a heated focus divergent opinions centering about the functions of this Congressional group. Practical results of the hearing consisted in the elicitation of the information that a communist group is active among motion picture labor, but that little success in the dissemination of communist propaganda through the films has been effected.[106] Arising from less fruitful phases of the investigation came the citation for contempt of Congress of ten witnesses.[107] The comparison of these results with the power of Congressional committees in general and with this committee's own authorizing resolution in particular demonstrates the use of the investigating committee as an anti-communist device. A series of cases of long standing lays down by dictum and holding the broad limits of Congressional investigatory power armed with the subpoena and the power to punish for contempt. The dogma is that Congress may not exceed its legislative function, *e. g.,* investigate in a field in which it could not possibly have a legislative power.[108] Positively, it may investigate matters relative to its own organization,[109] and in fields where legislation may possibly be forthcoming.[110] Congress' power to demand attendance, the production of papers,[111] and the answering of its questions, is enforced by its power to punish for contempt by conviction before the whole house [112] or by citation to a district attorney for prosecution in the courts.[113] Limitation on such contempt powers does not depend merely upon the power of Congress to investigate the particular subject at hand, but also upon the pertinency of the questions put to the witness.[114]

105. See Schlesinger, *supra* note 103. It is also the writer's position that the investigation of loyalty under such stringent regulations should be confined to the more "sensitive" organs of the government supervising foreign relations and military affairs. A distinction somewhat analogous has been drawn between the political activity under the Hatch Act of a policy-making employee and a manual laborer. See United Public Workers of America (C. I. O.) v. Mitchell, 330 U. S. 75, 120 (1947).

106. N. Y. Times Oct. 21, 1947, p. 1, col. 8.

107. N. Y. Times, Oct. 31, 1947, p. 1, col. 6; *id.,* Oct. 30, 1947, p. 1, col. 2; *id.,* Oct. 29, 1947, p. 1, col. 6; *id.,* Oct. 28, 1947, p. 1, col. 3.

108. Kilbourn v. Thompson, 103 U. S. 168, 194 (1880); see EBERLING, CONGRESSIONAL INVESTIGATIONS 353 (1928).

109. *In re* Chapman, 166 U. S. 661 (1897).

110. McGrain v. Daugherty, 273 U. S. 135 (1927).

111. Jurney v. MacCracken, 294 U. S. 125 (1935).

112. *See In re* Chapman, 166 U. S. 661, 671 (1897).

113. REV. STAT. § 102 (1875), as amended, 2 U. S. C. § 192 (1940).

114. Sinclair v. United States, 279 U. S. 263 (1929) (question as to lease of oil lands, in Teapot Dome inquiry, held pertinent); United States *ex rel.* Cunningham v. Mathues, 33 F. 2d 261 (C. C. A. 3d 1929) (held not pertinent to ask witness, in

Dissatisfaction with the Committee on Un-American Activities has been great throughout its existence, the principal accusation being that it has not confined itself to the fulfillment of a legislative function, *i. e.*, the production of legislation,[115] but has used its power to denominate as communist, not only groups communist in fact but also those shading off to the right in various degrees of "liberalism." [116] The enormous publicity afforded the committee permitted public accusation of communist affiliation to be made in the absence of the person so accused and without any right of defense.[117]

Recent contempt cases [118] have sought to attack the basic power of Congress to conduct an investigation which by its very nature, revealed in its authorizing resolution,[119] must treat with matters touching civil liberties. The lower federal courts have thus far refused to accept the argument that Congress is without power to legislate on a subject within the area of the First Amendment.[120] Judicial inclination to allow Congress maximum latitude in its discretionary investigation into any field possibly productive of legislation would permit an inquiry such as that which brought forth the Voorhis and McCormack Acts [121] and the 1940 sedition legislation.[122] The argument [123] that no legislation has been forthcoming from the Un-American Activities Committee other than the "bill of attainder" of the *Lovett* case [124] has likewise been rejected in the lower courts, since

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investigation of election of Senator Vare, where witness had obtained money subsequently contributed to Vare's campaign fund). *But cf.* Barry v. United States *ex rel.* Cunningham, 279 U. S. 597 (1929) (companion case on same facts; same questions held pertinent to the inquiry).

115. See Note, *Congressional Contempt Power in Investigations Into the Area of Civil Liberties,* 14 U. OF CHI. L. REV. 256, 258, n. 12 (1947), where the power of Congress to investigate solely to inform public opinion, is questioned.

116. 84 CONG. REC. 1102 (1939).

117. This procedure has long been supported as to Congressional inquiries generally, on the ground that an investigation is not a criminal trial and that these methods are a necessary adjunct to the investigatory process. See remarks of Senator George recorded in McCrain v. Daugherty, 273 U. S. 135, 179 (1927).

118. United States v. Josephson, 164 F. 2d — (C. C. A. 2d 1947); United States v. Dennis, 72 F. Supp. 417 (D. C. 1947); United States v. Bryan, 72 F. Supp. 58 (D. C. 1947).

119. H. Res. 5, 80th Cong., 1st Sess. (1947), adopting 60 STAT. 812, 828 (1946): "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigation of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic orgin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

120. *E. g.,* United States v. Groves, 18 F. Supp. 3 (W. D. Pa. 1937) (a committee conducted investigations involving labor legislation under an authorization "to make an investigation of the rights of free speech and assembly and undue interference with the rights of labor to organize and bargain collectively"); cases cited note 118 *supra.*

121. Voorhis Anti-Subversive Activities Act, 54 STAT. 1201, 18 U. S. C. §§ 14-17 (1940); McCormack Registration of Foreign Propagandists Act, 52 STAT. 631 (1938), as amended, 22 U. S. C. §§ 611-621 (1940).

122. 54 STAT. 670, 18 U. S. C. §§ 9-13 (1940).

123. See Brief in Support of Motions to Dismiss Indictment, United States v. Dennis, 72 F. Supp. 417 (D. C. 1947), at p. 3 of brief. *But see* Townsend v. United States, 95 F. 2d 352 (App. D. C. 1938) (a committee empowered to investigate pension plans was properly engaging in a legislative function, though no legislation had been forthcoming).

124. United States v. Lovett, 328 U. S. 303 (1946).

no single inference necessarily results from the failure of a committee to report any legislation favorably for passage, unless it might be the inference that the committee has found no legislation advisable, expedient, or desirable. Assuming a power to investigate matters which might possibly involve the existence of the Communist Party,[125] its numbers, their relative influence in labor groups, etc., a question put to any individual witness as to his personal relation to the party would appear to come within the requirements of pertinency. The possibilities resulting from the asking of such a question of a person who is in fact a communist are: (1) he may answer negatively and subject himself to a charge of perjury when a committee investigator reveals the information which the committee has apparently possessed all along; (2) he may refuse to answer at all and subject himself to a charge of contempt; (3) he may answer affirmatively and thereupon be subjected to discharge by a private employer. While Congress and other federal agencies may properly have power to discharge those who are shown by objective standards to be disloyal to the United States, it is to be questioned whether the power of Congress to investigate, even as to matters within the scope of the committee's resolution, comprehends the power to force a member of the Communist Party into this position and effectively impose the burden of loss of employment, present and future, without more judicial inquiry than the eliciting of the answer that the witness "is or has been a member of the party."

Proposed methods of control of a committee which possesses an apparent power to interfere in the field of civil liberties have been various. One is that the declaratory judgment be made available to witnesses.[126] While this might be helpful in the situation where the scope of a subpoena duces tecum is sought to be tested,[127] it would hardly comport with the nature of an information gathering committee in the case where the issue of the pertinency of a question is presented. A further proposal is that the fact gathering committee be changed into an organization presided over by non-political experts rather than by political figures seeking personal capital out of their manipulation of the device.[128] The advisability of the latter proposal is very great; the probability of its occurrence in a field of such rich political material is very small. The best of the feasible methods is to recognize the value of legislative committees,[129] and to work for the operation of self-restraint. Though this is enormously difficult to accomplish in a period of political pressures, a dependence on the right of the voter to remove the offending Congressman who misuses an invaluable instrument may be as effective as dependence upon a court which is just as likely to feel that the mere existence of the Communist Party is anathema.[130]

125. *But cf.* Circuit Judge Clark, dissenting in United States v. Josephson, 164 F. 2d — (C. C. A. 2d 1947), wherein he asserts that phrases such as "un-American" and "subversive" in the authorizing resolution are so indefinite that they cannot be used as a standard in a criminal contempt procedure against a witness refusing to testify before the committee. See Note, *Constitutional Limitations on the Un-American Activities Committee,* 47 COL. L. REV. 416 (1947).

126. Note, *Congressional Contempt Power in Investigations in the Area of Civil Liberties,* 14 U. OF CHI. L. REV. 256, 267 (1947).

127. *Hearings Before Committee on Un-American Activities on H. Res. 5,* 79th Cong., 2d Sess. 103 (April 4, 1946).

128. *Legislative Investigations,* 9 INT'L. JURID. ASS'N. BULL. 73, 84 (1941).

129. See Frankfurter, *Hands Off the Investigations,* 38 NEW REPUBLIC 329 (1924). Note, however, the statement, p. 331: "Of course the essential decencies must be observed, namely opportunity for cross-examination must be afforded to those who are investigated or to those representing issues under investigation."

130. *See* Burke v. American Legion, 14 Ohio App. 243 (1921) for an example of the type of judicial thinking which is possible in a time of popular hysteria.

CONTROL OF MEMBERSHIP IN ASSOCIATIONS

Social and economic ostracism below the political level has been a device employed by anti-communist forces since the early days of the party's existence in this country. One of its earliest manifestations was the expulsion of party members from the labor union.[131] Appeals to the courts for reinstatement were met with the answer that the internal affairs of the private association were of no concern to the courts, so long as fundamental methods of hearing and review had been accorded the aggrieved person.[132] Union constitutions have adopted clauses making "membership in the Communist Party" an explicit ground for expulsion.[133] Other bases for expulsion or for denial of admission in the first instance have undergone re-examination, and the pressures have been great and, in some states, effective, to create disabilities on labor unions to expel members because of race, color, or creed.[134] The further category of "political affiliation" has made its appearance in several proposed statutes,[135] but its conspicuous absence from completed legislation creates at least an inference that legislatures are not anxious to afford Communist Party members the opportunity to make use of such legislation to preserve their position in the union movement.[136]

The Taft-Hartley Act[137] would appear to preserve to the union the power to discipline its members for communist activity, since internal control of union affairs is expressly reserved by Section 8 (b) (1). However, to the extent that the exercise of the power of expulsion does not produce upon the worker immediate economic detriment, the power has been limited. Section 8 (a) (3) and 8 (b) (2) are designed to prevent union pressure on the employer, and the employer's yielding to such pressure, for the purposes of discharging an employee for causes associated

131. MILLIS AND MONTGOMERY, ORGANIZED LABOR 178, n. 2 (1945) (membership in W. Z. Foster's Trade Union Educational League, a communist labor group, was considered ground for expulsion from A. F. L. unions).

132. Harmon v. United Mine Workers of America, 166 Ark. 255, 266 S. W. 84 (1924) (principle was applied in the case of expulsion for membership in the Ku Klux Klan). *See also* Shein v. Rose, 12 N. Y. S. 2d 87 (Sup. Ct. 1939); Witmer, *Civil Liberties and the Trade Union*, 50 YALE L. J. 621, 630 (1941).

133. CONST., UTILITY WORKERS UNION OF AMERICA (C. I. O.), Art. III, § 5 (1946); CONST., UNITED CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA (C. I. O.), Art. IX, § 1 (1946); Summers, *The Right to Join a Union*, 47 COL. L. REV. 33, 34 (1947). In Ames v. Dubinsky, 70 N. Y. S. 2d 706 (Sup. Ct. 1947), union members were expelled under provisions of the union constitution permitting discharge for conduct detrimental to the union, *i. e.*, the libelling of union officers. Although asserting that it was but a minor issue in the case, the court expatiated upon the union members' status as admitted communists and upon the character of the Communist Party.

134. Railway Mail Ass'n v. Corsi, 326 U. S. 88 (1945).

135. *See, e. g.*, 16 LAB. REL. REP. 91 (1945) (California proposal to prohibit labor organizations from controlling, directing or preventing the political activities or affiliations of its members or for disciplining its members for the same).

136. Pennsylvania is, however, an exception: the definition of labor organization in its labor relations statute excludes that organization which denies membership for specified reasons, including "political affiliation." PA. STAT. ANN., tit. 43, § 211.3(f) (Purdon, Supp. 1946). However, the denial of labor board facilities to a union discriminating against communists would seem improbable despite the phraseology of the statute. A jurisdictional finding by the board that Communist Party membership is not "political affiliation" in the sense contemplated by the statute, but is association with a group inimical to the collective bargaining process, might be sufficient to sidestep the issue.

137. Pub. L. No. 101, 80th Cong., 1st Sess. (June 23, 1947), 29 U. S. C. A. § 141 (Cumulative Pamphlet 1947). Further references to the Taft-Hartley Act will be by section number of the amended National Labor Relations Act.

with union membership. Therefore a union which has expelled a member because of communist leanings may not demand that a union shop contract be enforced and the laborer fired, so long as the aggrieved member pays dues. An employer who yields to such pressure would be guilty of an unfair labor practice. On the other hand, an employer who should discharge an employee not for non-membership in the union but simply because the laborer was a communist, would not be guilty of an unfair practice.[138]

The provision of the Taft-Hartley Act relative to the filing of non-communist affidavits is an example, on the other hand, of the state's attempt to make use of the internal control of the labor union to effectuate an anti-communist policy by relative indirection.[139] Certain effects of the affidavit provision are readily apparent. The union which does not comply will not be able to file for election as a representative, nor to request a union shop election, nor to file an unfair labor practice charge. Since an employer will not be ordered to bargain with a non-complying union,[140] and since such a union will not be placed on the ballot upon its intervention in a certification proceeding,[141] the union member's right under section 9 (c) (1) to request a certification election is hardly a valuable one. He is apparently left with only the privilege of filing on his own initiative an unfair labor practice charge.[142] Since the disabilities of his own union will be reflected as his own to a certain extent, the employee will be considerably limited in the area of protection afforded him by the act. Though the express purpose of this portion of the act may be to accomplish this very result and thereby to put the individual member of a communist-led union in the position where he would be encouraged to repudiate such leadership,[143] constitutional problems are unanswered. The provision may be unacceptable constitutionally because it denies due process to union leaders deposed from official position, in that state pressure upon employees has in fact been the cause of removal.[144] A further constitutional disability may lie in the denial of due process to the employee who is compelled to forego union leadership otherwise of his own choosing, because the leader refused to disavow even a supposed communist affiliation. An assertion that the classifications created by the affidavit requirement are a valid exercise of the commerce power as bearing a reasonable relation to the necessity for maintaining an undisturbed flow of commerce may be answered by noting that guarantees of freedom of speech and of belief found in the First Amendment are involved in this situation.[145] Reasonableness has been accepted as the constitutional test of the validity of the more usual "social legislation" affecting rights of property, but the drawing of lines on this basis alone has been disallowed in circumstances wherein

138. See Note, *Union Security Devices and the Taft-Hartley Act*, 96 U. OF PA. L. REV. 101-111 (1947).

139. § 9(h).

140. Marshall and Bruce Co., 1 CCH LAB. LAW SERV. ¶ 6262 (1947).

141. Wilson Transit Co., 1 CCH LAB. LAW SERV. ¶ 6269 (1947).

142. § 19(b).

143. Northern Virginia Broadcasters, Inc., 1 CCH LAB. LAW SERV. ¶ 6257 (1947).

144. Comment, *The Labor-Management Relations Act of 1947, The "Communist" Provision and Union Registration Requirements*, 42 ILL. L. REV. 487, 490 (1947).

145. § 9(h) is couched in terms of "member," "affiliated," and "belief." The contention that the guarantees of the First Amendment are not involved is hardly correct. The problem is rather in a more advanced stage: recognizing that elements of the First Amendment's guarantees are involved, is the danger to a governmental function such that Congress may exercise control in this manner?

rights propounded by the First Amendment are concerned.[146] The one case in which the problem has as yet been raised found the court willing to support the affidavit clause on the basis of the constitutional guarantee of a republican form of government to each state,[147] perhaps an effort to find as strong a basis as possible to overcome the First Amendment objections raised by plaintiff.

The competition of motivations illustrated by the voluntary expulsion of union members and the deposing of union officers as a result of governmental pressures raises basic questions as to advisable methods of control of the communist influence in the labor movement. There is nothing inherent in the nature of the voluntary association, particularly when the association is a labor union capable of making membership an economic necessity, to warrant the courts' insistence that judicial hands be kept off the internal workings of such organization, but such a policy may be supported by the fact that the basic purpose of fostering a trade union movement has been to create the mechanism of collective bargaining. It is within the individual union that the exercise of democratic functions [148] can best reveal to the membership whether a laborer is interested primarily in the operation of an effective collective bargaining group or in the use of the labor group as a sounding board for economic ideas opposed to peaceful industrial relations.[149] It may be best to rely on the union to differentiate between mere political belief and active hostility to preferred labor methods, and to judge for itself whether collective bargaining objectives are jeopardized by the retention in economic fellowship of one who holds such beliefs or who engages in such activity.[150]

The exertion of state pressure to remove leaders possibly communist in political belief is, on the other hand, unwise. Again, a primary purpose of a device implementing such pressure should be to create a favorable collective bargaining atmosphere.[151] Whether the affidavit requirement promotes this purpose is doubtful. Its results as to any particular union may be threefold. The union may refuse to depose the defaulting officer. The result is a group now deprived of the use of collective bargaining machinery, which may now seek to effectuate its aims outside this machinery, creating the very disruption sought to be avoided by banning communist influence. The union may on the other hand deny office to the person who refuses to sign, illustrating rather inconclusively either that the union had not been immobilized by communists in the first place or that the communist leadership had simply retired, as a matter of form and appearances only, into the general membership of the union, to remain no less effective in determining policy. The final possibility of commission of perjury by isolated communists in filing affidavits would result in a limited number of jail sentences. This may well be a negligible result in view of the fact that the price paid therefor, public acceptance of the affidavit technique in the hands of the state, is acquiesence in the use of a device pregnant with possibilities as an instrument for the production of conformity to economic and political norms.

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146. Sinsheimer, *Employer Free Speech—A Comparative Analysis,* 14 U. OF CHI. L. REV. 607, 618 (1947).

147. Oil Workers International Union v. Elliott, 73 F. Supp. 942 (N. D. Tex. 1947).

148. For an analogous situation in veterans' organizations, see Franklin, *Why I Broke With the Communists,* 194 HARPER'S 412 (1947).

149. See MILLIS AND MONTGOMERY, ORGANIZED LABOR 238-242 (1945).

150. *Cf.* Summers, *The Right to Join a Union,* 47 COL. L. REV. 33, 70 (1947).

151. § 1.

TRENDS

Efforts to confine the activities of communists and their associates fall within discernible categories. A large group of existing federal statutes is directed at the prevention of those more gross activities deemed destructive of the existence of an independent government.[152] A further group comprehends activities not entirely on the crassly physical level, but including exhortation to action by others,[153] and leading off into beliefs inimical to the present government, and into the teaching or advocacy of such beliefs.[154] Equivalent to those statutes are the recent proposals to render membership in the Communist Party a crime. Around such statutes, the operation of the canons of the criminal law, demanding certainty and definiteness of proof, and the force of the decisions interpreting the First Amendment, have thrown up serious impediments to a wholesale and perhaps indiscriminate application. The pressure has been toward the development of new devices, untrammelled by such hard-won protective elements, devices operating indirectly, imposing new sanctions such as economic deprivation in place of fine and incarceration. The inclination has been to draw within the operation of such techniques those persons who, because of their position only on the fringes of groups formerly subject to the criminal law, could not otherwise be brought under governmental control. The dangers are apparent in the subjection to such sanctions of people whose beliefs may be denominated liberal, or even radical, but whose actions bear not even a remote tendency of undermining faith in the evolutionary process of political development. The need exists for a recognition that unless some definite impression be transferred from that fruitful series of cases which has spelled out civil liberties under the First Amendment, whether that impression be called a "clear and present danger rule," or not, the exercise of civil liberty will be effectively frustrated.[155] Self restraint by public and legislature in a time of political strain and suspicion will be the most effective safeguard against such frustration. In the absence of such restraint, a judicial acuteness to perceive the purposes and possibilities latent in the newer devices, and a readiness to develop new, if need be, methodologies to raise the familiar protective bulwarks, are urgently needed.

N. E. L.

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152. Treason: 35 STAT. 1088 (1909), 18 U. S. C. § 1 (1940); criminal correspondence with foreign governments: 35 STAT. 1088 (1909), as amended, 18 U. S. C. § 5 (1940); injuries to fortifications: 35 STAT. 1097 (1909), as amended, 18 U. S. C. § 96 (1940); revolt and mutiny: 35 STAT. 1146 (1909), 18 U. S. C. § 484 (1940).

153. Inciting rebellion or insurrection: 35 STAT. 1088 (1909), 18 U. S. C. § 4 (1940); seditious conspiracy: 35 STAT. 1089 (1909), 18 U. S. C. § 6 (1940); enticing desertion from army and navy: 19 STAT. 253 (1877), 18 U. S. C. § 94 (1940); inciting revolt or mutiny: 35 STAT. 1146 (1909), 18 U. S. C. § 483 (1940).

154. 1940 Sedition Act: 54 STAT. 670, 18 U. S. C. §§ 9-13 (1940); Voorhis Anti-Subversive Activities Act: 54 STAT. 1201, 18 U. S. C. §§ 14-17 (1940); 1917 Espionage Act: 40 STAT. 219 (1917), 50 U. S. C. § 33 (1940).

155. See Mr. Justice Douglas, dissenting in United Public Workers of America (C. I. O.) v. Mitchell, 330 U. S. 75, 126 (1947). "Clear and present danger" is still the fact by which the allowable degree of political activity of the public servant should be measured, even though the sanction imposed for such activity is discharge from the service and not a criminal sanction of fine or incarceration. *Cf.* Sinsheimer, *Employer Free Speech—A Comparative Analysis,* 14 U. OF CHI. L. REV. 617, 636 (1947).

The Disintegration of a Concept—State Action Under the 14th and 15th Amendments

I. INTRODUCTION

When the Supreme Court decided the *Civil Rights Cases*[1] in 1883 it apparently settled forever that the 14th and 15th Amendments of the Constitution were limitations upon the acts of the state and not those of the private individual. The 14th Amendment forbids the states to abridge the privileges and immunities of citizens of the United States, to deprive a person of life, liberty or property without due process of law, or to deny a person the equal protection of the laws. The 15th Amendment forbids a state to abridge the right of a citizen to vote on account of race or color.[2] To the Court that decided the *Civil Rights Cases* and the other early cases interpreting the Amendments it seemed clear that the Amendments had a dual character. First, certain rights of the individual were protected.[3] Second, this protection was to be afforded against *state action.*[4] This duality was conceptualized, and a finding of some definitive form of state action became a prerequisite for federal review of any alleged infringement of the protected rights. Moreover, to the *Civil Rights* Court it seemed axiomatic that *state action* was one thing and *private action* another. As a matter of basic constitutional theory the state regulated the individual, while federal control was addressed in turn to the state. Private action enjoyed a constitutional immunity.

But with time the concept of *state action* has been gradually extended. Necessarily the concept of private action has been narrowed, for the effect has been to bring within the range of constitutional scrutiny by the federal courts more and more activity formerly viewed as private. Especially significant are recent racial restrictive covenant cases where, in order to invoke federal review on constitutional grounds, attempts are being made to extend *state action* to include state court enforcement of racially discriminatory private contracts.[5] The extension of *state action* might appear cause for concern. From a conceptual point of view *state action* has undergone a gradual disintegration which makes definition today illusory; and from a constitutional point of view there has been an encroachment by the federal power upon the state's traditional domain. It would appear that this concern seems justified where original federal jurisdiction has been allowed over cases involving private discrimination. But for the most part—and this is true in the restrictive covenant cases—

1. 109 U. S. 3 (1883).

2. In addition, by § 5 of the 14th Amendment and § 2 of the 15th Amendment Congress was empowered to enforce the Amendments by appropriate legislation.

3. The character of the protected rights has always been a fertile field for litigation and legal writing; see KONVITZ, CONSTITUTION AND CIVIL RIGHTS 8-106 (1947); annotations in DOWLING, CASES ON CONSTITUTIONAL LAW 734-907 (3d ed. 1946) *passim.*

4. The extent of the concept of state action has received but scant critical comment; but see Isseks, *Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials,* 40 HARV. L. REV. 969, 980-1 (1927).

5. There are at present before the Supreme Court on certiorari four cases, all involving the constitutionality as state action of enforcing private racial restrictive covenants attaching to land: Hurd v. Hodge and Urciolo v. Hodge, 162 F. 2d 233 (App. D. C. 1947), *cert. granted,* 68 Sup. Ct. 100 (1947); Sipes v. McGhee, 316 Mich. 614, 25 N. W. 2d 638 (1947), *cert. granted,* 331 U. S. 804 (1947); Kraemer v. Shelley, 355 Mo. 814, 198 S. W. 2d 679 (1946), *cert. granted,* 331 U. S. 803 (1947).

Also of interest is a case which came up earlier in 1947 in which a landlord's restrictive rental policy was challenged as unconstitutional state action. The lower court has denied an injunction against the discrimination. Dorsey v. Stuyvesant Town Corp., 74 N. Y. S. 2d 220 (Sup. Ct. 1947).

the extension of the concept merely evidences a growing realization that state courts as well as state legislatures can make discriminatory state law which should be subject to constitutional limitations; moreover, *state action* will necessarily involve the context of the protected rights themselves, for not all *state action* is unconstitutional.

II. Historical Background

Private rights, as well as state's rights, had been of concern to the founding fathers. Hence, the Constitution outlined not only those powers specifically allowed the federal government in order to protect the states, but also those powers denied the states in order to protect the individual.[6] The individual's protection against his government was further and immediately bulwarked as to the federal government by the adoption of the first ten Amendments, the Federal Bill of Rights.[7] Thus there was ostensibly established a complete, although delicate, balance between the individual's rights and his government's powers, both state and federal.

The Civil War, however, brought home starkly the realization that perhaps states' rights had been over-emphasized at the expense of the individual, in particular the negro. The 14th and 15th Amendments were adopted immediately after the war primarily to protect the civil rights of the newly emancipated negro from abridgment by the southern states.[8] Abridgment by what means? By *state action,* of course, but what kind? Evidence would indicate that both those who proposed the Amendments and the Congress that passed them had in mind only state legislative action.[9] Accordingly, in the *Slaughter-House Cases*[10] of 1875, the first Supreme Court interpretation of the Amendments, the validity of a Louisiana statute was tested.[11] Shortly thereafter a West Virginia statute which prevented negroes from serving on juries was declared unconstitutional as *state action* abridging a right protected by the 14th Amendment.[12] The

6. Rottschaefer, Constitutional Law 82-93 439-40 (1939); 1 Morison and Commager, Growth of the American Republic 170-3 (rev. ed. 1937). The specific limitations in the Constitution against the state in favor of the individual are found in Art. I, § 10, and include provisions relating to passing bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts.

7. Rottschaefer, *op. cit. supra* note 6, at 724.

8. Slaughter-House Cases, 16 Wall. 36, 67-73 (U. S. 1872). The widespread adoption in the southern states of Black Codes severely curtailed the negro's new freedom. A federal Freedmen's Bureau was established to remedy this situation and was implemented by the Civil Rights Act of 1866, 14 Stat. 27 (1866), but the latter was of such dubious constitutionality that the 14th and 15th Amendments were adopted. 2 Morison and Commager, *op. cit. supra* note 6, at 16-23, 39-40. See also Flack, Adoption of the Fourteenth Amendment (1908). At least one writer has urged, however, that the intent of the 14th Amendment was to protect primarily the vested property interests, as the Amendment eventually came to be interpreted: Leary, Due Process and Equal Protection (unpublished thesis in the Princeton University Library, 1932).

9. 2 Morison and Commager, *op. cit. supra* note 6, at 39-40, 51-2; Flack, *op. cit. supra* note 8.

10. 16 Wall. 36 (U. S. 1872).

11. The Court in this case held the statute, which established a packing-house monopoly, constitutional on the ground that while it was state action it did not abridge a protected right. While the Court thus addressed itself primarily to the constitutionality of the statute it also indicated that the Amendments were aimed at legislative action. *Id.* at 74, 78; see dissenting opinion of Field, J., at 96-7, 100-1.

12. Strauder v. West Virginia, 100 U. S. 303 (1879). This was the first case declaring a state statute invalid under the 14th Amendment.

validity of state legislation has subsequently been involved in by far the greater number of cases invoking the civil rights protection of both the 14th [13] and 15th [14] Amendments.

The courts, however, were from the beginning quick to realize that a state could abridge a protected right in ways other than by enacting legislation. In *Virginia v. Rives*,[15] decided in 1879, the concept of *state action* was said to include not only legislative but executive or judicial action as well.[16] This was subsequently interpreted as follows. First, a state acts when its executive agents directly carry out the legislative command;[17] this has been held to include acts of municipal corporations,[18] public service commissions,[19] tax boards,[20] and governing boards of state-owned educational institutions.[21] Second, a state acts when, through its judiciary, it arbitrarily fails to accord an individual procedural due process.[22] Furthermore, it was an inevitable realization that under a common law system the courts as well as the legislature can make law, either originally or by interpretation of a statute, and so judge-made substantive law has come also to be recognized as *state action*.[23]

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13. See ROTTSCHAEFER, *op. cit. supra* note 6, at 441.

14. *Id.* at 752. The total of cases involving the 15th Amendment is relatively small. In the leading case of Guinn v. United States, 238 U. S. 347 (1915), the so-called "grandfather clause" of the Oklahoma constitution was declared unconstitutional, since it provided in effect a literacy test for negroes to vote where there was no similar restriction for whites.

15. 100 U. S. 313 (1879).

16. *See id.* at 318. The case involved the constitutionality of a murder conviction in a Virginia county court where a negro was convicted by an all-white jury. The Court upheld the conviction because there was no evidence of any discrimination. The case, therefore, is dictum, but nevertheless represents the first attempted comprehensive definition of the meaning of state action, and has generally been relied on. ROTTSCHAEFER, *op. cit supra* note 6, at 441. *See Ex parte* Virginia, 100 U. S. 339, 346-7 (1879).

17. ROTTSCHAEFER, *op. cit. supra* note 6, at 441; *see* United States v. Harris, 106 U. S. 629, 639 (1882); concurring opinion of Frankfurter, J., in Snowden v. Hughes, 321 U. S. 1, 13 (1944).

18. Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278 (1913).

19. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362 (1894).

20. Raymond v. Chicago Union Traction Co., 207 U. S. 20 (1907).

21. Hamilton v. University of California Regents, 293 U. S. 245 (1934).

22. Pennoyer v. Neff, 95 U. S. 714 (1877) (state court judgment invalid when based on judicial proceeding in which there was no service on or jurisdiction over the individual defendant). "Due Process of Law" was adopted from Magna Charta and inserted in the 5th Amendment as a protection to the individual against the federal government. It was initially interpreted as "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." Johnson, J., in Bank of Columbia v. Okely, 4 Wheat. 235, 244 (U. S. 1819). The protection of the due process clause was extended to apply also against the states by its inclusion in the 14th Amendment. Hurtado v. People of California, 110 U. S. 516, 534-5 (1884); see also MOTT, DUE PROCESS OF LAW, c. XIV (1926) *passim*. Lack of due process may be either procedural or substantive; see Lewis and Putney, *Due Process Clauses in the Constitution of the United States*, 8 NAT. UNIV. L. REV. 1 (1928). Lack of procedural due process has been typically presented by judicial decisions: Pennoyer v. Neff, 95 U. S. 714 (1877); Moore v. Dempsey, 261 U. S. 86 (1923) (murder conviction based on trial subject to mob domination void). Lack of substantive due process has been typically presented by legislative acts: Truax v. Corrigan, 257 U. S. 312 (1921) (state labor statute granting civil and criminal immunity to strikers unless "irreparable damage" done to property held to deprive employer of property without due process). But see note 23 *infra*.

23. American Federation of Labor v. Swing, 312 U. S. 321 (1941) (common law policy of state court forbidding peaceful picketing held unconstitutional violation of free speech under 1st and 14th Amendments); *see* Truax v. Corrigan, 257 U. S. 312, 334, 340-1 (1921) (court can by construction of statute deprive individual of due process); Chicago, B. & Q. R. R. v. Chicago, 166 U. S. 226, 234-5 (1897) (judicial decision may satisfy procedural requirements but still be inconsistent with 14th Amend-

It was not long, however, before the Supreme Court was called upon to define the limits of *state action.* By virtue of the enabling clause of the 14th Amendment,[24] Congress in 1875 had passed a Civil Rights Act,[25] making it both a civil and criminal offense for owners of inns, public conveyances, theaters and places of amusement to discriminate against persons by reason of race or color. In a landmark decision in 1883, the *Civil Rights Cases,* the Court declared the statute unconstitutional as unwarranted by the 14th Amendment, saying that *state action* and not individual invasion of the individual rights was the subject matter of the Amendment.[26] The decision would appear unequivocally to immunize private discrimination from the reach of the Amendments. On the contrary, examination of the cases occurring since the *Civil Rights* decision reveals what seems to be a striking invasion of this adjudicated immunity of private action by a gradual extension of *state action* and the corresponding narrowing of *private action,* climaxed by recent attempts to declare unconstitutional a landlord's restrictive rental policy and state court enforcement of landowners' restrictive covenants.[27] The extension of the concept has taken place in two ways: first, by extension to include individual action not authorized by the state but performed under color of state authority; second, by extension to include individual action when it is sanctioned by the state.

III. Individual Action Under Color of State Authority

The Court in the *Civil Rights Cases* had not, in distinguishing state from private action, faced the difficulty of so distinguishing where the discriminatory act was committed by an individual using either state-given power or state-provided machinery, *i. e.,* under color of state authority. It is easy to see how a state by pure legislative action in enacting a

ment in substance). See also Note, *Constitutionality of Judicial Decisions in Their Substantive Law Aspect Under the Due Process Clause,* 28 Col. L. Rev. 619 (1928); Note, *Due Process as a Substantive Restriction Upon Judicial Decisions,* 34 Col. L. Rev. 891 (1934); Pound, *The Theory of Judicial Decisions,* 36 Harv. L. Rev. 641 (1923). *Cf.* Note, *Judicial Errors, Unfair Trials, and the Fourteenth Amendment,* 44 Harv. L. Rev. 447 (1931).

But as state action, judge-made substantive law may or may not infringe a right protected by the Amendments. A constitutional right will not *per se* be infringed merely because a state court renders an erroneous decision, by misapplication of law or by faulty logic. Enterprise Irrigation District v. Farmers' Mutual Canal Co., 243 U. S. 157 (1917) (mere misconception by state court of local state law does not in itself deprive appellant of due process). Nor, similarly, if the state court renders a decision without precedent. American Ry. Express Co. v. Kentucky, 273 U. S. 269 (1927) (original common law ruling does not involve constitutional question unless it amounts to denial of procedural due process or conflicts with a fundamental principle for the protection of private rights). See opinion of Holmes, J., in Patterson v. Colorado, 205 U. S. 454, 461 (1907).

By contrast, the limitation of the obligation of contracts clause, Art. I, § 10, has been held to apply only to state action purely legislative in character. New Orleans Waterworks Co. v. Louisiana Sugar Co., 125 U. S. 18 (1888); see Rottschaefer, *op. cit. supra* note 6, at 558-9.

24. Section 5: see note 2 *supra.*

25. 18 Stat. 335 (1875).

26. "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. . . . It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment." Civil Rights Cases, 109 U. S. 3, 11 (1883). This holding had been foreshadowed by dicta in earlier cases; *see* Virginia v. Rives, 100 U. S. 313, 318 (1879); United States v. Cruickshank, 92 U. S. 542, 554-5 (1875).

27. See note 5 *supra.*

statute [28] or adopting a constitution [29] can thus, without further action, deny an individual a protected right. The right is prevented from ever attaching. Such would be a law preventing a negro from owning land or voting. The next step also is not difficult. The legislative action may require some positive carrying out by the state's executive agents, where the right is already being enjoyed but the law is taking it away. Such would be a law confiscating a negro's land. The administration of the law by the state's agents would be at least as much *state action* as the legislative enactment of the law.[30] Where by its discriminatory character the law is violative of the rights protected by the Amendments, the courts will declare the law itself unconstitutional; and where the state's agents attempt to carry out the discriminatory law, they will be enjoined.

But the next step is not so easy. Where the law is not itself discriminatory but the state's agents discriminate in carrying out the law, can this be said to be *state action?* Logically it would not so appear. When the state's agents discriminate by means of state-given power it would appear that they are not acting for the state, since the state never authorized them so to act. They are acting on their own, privately. The state-given power is being misused.

The courts, however, in dealing with the misuse of state power have not followed the dictates of pure logic,[31] but seem to have taken an analogy to respondeat superior,[32] with a resulting extension of *state action.* In Ex parte *Virginia,*[33] a case decided four years prior to the *Civil Rights Cases,* the Court under an enabling statute of the 14th Amendment allowed the conviction of a state judge who used his statute-given power of discretion to discriminate against negroes in the selection of jurors. The Court did not consider or seek to answer the problem that the statute failed to authorize the discrimination; [34] nor was there any mention of this problem in the subsequent *Civil Rights Cases* which enunciated the *state action-private action* distinction, despite a reliance on Ex parte *Virginia.*[35] Nevertheless, the decision in Ex parte *Virginia* has become the basis for an entire line of cases holding the unauthorized discriminatory use of state-given power to be *state action* prohibited by the Amendments.[36]

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28. *See, e. g.,* Strauder v. Virginia, 100 U. S. 303 (1879) (state statute).

29. *See, e. g.,* Guinn v. United States, 238 U. S. 347 (1915) (clause in state constitution).

30. See notes 17 through 21 *supra.*

31. But see the remarks of Field, J., concurring in Virginia v. Rives, 100 U. S. 313, 334 (1879): "If an executive or judicial officer exercises power with which he is not invested by law, and does unauthorized acts, the state is not responsible for them. . . ."

32. Note the language in *Ex parte* Virginia, 100 U. S. 339, 347 (1879). See McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional,* 33 CALIF. L. REV. 5, 17 (1945). The corresponding illogic of respondeat superior is emphasized in HOLMES, COMMON LAW 5-20 (1881). Where there is discrimination by a state agent not authorized by state statutes, can respondeat superior be applied in any event? Discrimination would seem to imply a special intent, and respondeat superior is generally inapplicable to intentional wrongs committed by the agent. See RESTATEMENT, AGENCY § 235 (1933).

33. 100 U. S. 339 (1879).

34. *See id.* at 346-7. The failure directly to consider this problem is all the more remarkable, in view of the comments of Field, J., in the leading case of Virginia v. Rives, 100 U. S. 313 (1879), decided in the same term on the same question as *Ex parte* Virginia; see note 31 *supra.*

35. See the language in the Civil Rights Cases, 109 U. S. 3, 11-12 (1883).

36. ROTTSCHAEFER, *op. cit. supra* note 6, at 443-4. *See also* Davis v. Cook, 55 F. Supp. 1004 (N. D. Ga. 1944) (discrimination by municipal school board against negro school teachers as to salaries). *Distinguish* Snowden v. Hughes, 321 U. S. 1

At first it was easier to see the *state action* when a state court had already upheld the action of the state agent.[37] Apparently the action of the state court lent state sanction and ratification to the unauthorized act of the agent.[38] But subsequently, in *Home Tel. and Tel. Co. v. City of Los Angeles*,[39] where city officials put into effect ruinously low rates for a telephone company, the Court said this was *state action* even though a state court had not yet upheld the action.[40] The Supreme Court has made some attempt to limit the extension of the *state action* concept in this field, where the agent's action is specifically contrary to the legislative command and rooted in design.[41] Nevertheless, at least one recent case has held there was *state action* where the action, while not specifically proscribed by the statute, was so outrageously discriminatory as clearly to exceed even the traditional limits of the supposedly analogous respondeat superior.[42]

(1944) (no discrimination); Hayman v. Galveston, 273 U. S. 414 (1927) (no discrimination); Barney v. New York, 193 U. S. 430 (1904) (commented upon in note 41 *infra*). *Cf.* Steele v. Louisville & Nashville Ry., 323 U. S. 192 (1944) (discriminatory act of union designated exclusive bargaining agent under National Railway Labor Act enjoined). *But contrast* National Federation of Ry. Workers v. National Mediation Board, 110 F. 2d 529 (App. D. C. 1940) (certification of all-white union by National Board where majority of workers voted for it does not unconstitutionally discriminate against all-colored union). *Contra:* Mason v. Hitchcock, 108 F. 2d 134 (C. C. A. 1st 1939) (refusal of state bar examiners to certify plaintiff called private action).

37. Yick Wo v. Hopkins, 118 U. S. 356 (1886) (state court decision, convicting defendant Chinese for operating laundry without license when municipal authorities had discriminated by refusing to issue one, held unconstitutional under 14th Amendment); Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239 (1931) (discrimination in assessing taxes by state officials where law not inequitable in itself when approved by highest state court held unconstitutional under 14th Amendment). "Moreover, since the State now insists on retaining the higher tax exacted from the national bank, and is sustained in so doing by the highest court, the discriminatory action cannot be said to be the act of the individual officials." *Id.* at 245.

38. *Cf.* Part IV *infra.*

39. 227 U. S. 278 (1913).

40. Here the plaintiff went directly into the federal district court. The Supreme Court said: ". . . the provisions of the [14th] amendment . . . are generic in their terms, are addressed, of course, to the States, but also to every person whether natural or juridical who is a repository of state power." *Id.* at 286. See also Raymond v. Chicago Union Traction Co., 207 U. S. 20 (1907) (discriminatory assessment by state tax board held unconstitutional under 14th Amendment where plaintiff went directly into federal court). *But contrast* dissenting opinion of Holmes, J., *id.* at 41: ". . . the action of the state board of equalization should not be held to be the action of the State until, at least, it has been sanctioned directly in a proceeding which the appellee is entitled to bring, by the final tribunal of the State, the Supreme Court." Under Justice Holmes' reasoning, however, the action of the lower federal court could be interpreted as federal sanction of the discrimination amounting to federal action, and as such might run afoul of the due process clause in the 5th Amendment. See note 22 *supra* and note 58 *infra.*

41. Barney v. New York, 193 U. S. 430 (1904) (no constitutional problem involved where municipal agent's act was absolutely forbidden by state legislation). Note, however, that the Court subsequently in Raymond v. Chicago Union Traction Co., 207 U. S. 20 (1907) purportedly distinguished the *Barney* case, but in effect overruled it, since the *Raymond* case held the unauthorized act of a state agent to be state action, even though it was in fact forbidden by the state constitution. See Holmes, J., dissenting, *id.* at 41. Note also the reluctance of the Court in Snowden v. Hughes, 321 U. S. 1, 13 (1944) to rule on this question in view of the cases cited notes 39 and 40 *supra.* See concurring opinion of Frankfurter, J., *id.* at 15-16.

42. United States v. Sutherland, 37 F. Supp. 344 (N. D. Ga. 1940) (indictment under an enabling statute of 14th Amendment of police officer who tortured suspect held valid). *Cf.* Screws v. United States, 325 U. S. 91 (1945).

If it is difficult, logically, to extend *state action* to include the unauthorized misuse of state power by state agents, it is even more difficult to take the next step—where no agency relationship or grant of state power exists, but the discrimination is affected by the use of state provided or regulated machinery. It is thought that because the state either provides or even has some control over the means the state is responsible for the end. In effect the discrimination acquires a state character because of some positive connection of the state with the mechanism used to accomplish the discrimination.

This last mentioned step has been taken by the courts only recently. A typical example is the decision in *Smith v. Allwright.*[43] A Texas statute preventing negroes from voting in primary elections had been declared unconstitutional under the 14th and 15th Amendments in 1927.[44] Texas countered by passing a statute giving the state executive committee of the party power to determine voting eligibility: this was similarly declared unconstitutional in 1932.[45] Thereupon Texas ceased passing statutes and left the parties to their own devices in regulating voting qualifications for primaries. A state party convention then passed a resolution excluding negroes from voting in primaries and, although at first this discrimination was held beyond the reach of the Amendments,[46] this was overruled by the Supreme Court in the 1944 case of *Smith v. Allwright.* The Court, under an enabling act of the 15th Amendment,[47] allowed suit by a negro against state election judges who had refused him a primary ballot solely because of the party's convention resolution. Here then the discriminatory action of the ostensibly private political party, when accomplished through state provided and regulated electoral machinery, became *state action.*[48]

Moreover, the efforts of state political parties to circumvent the effect of *Smith v. Allwright*[49] have evoked at least one decision going even further in extending *state action.* In order completely to remove the taint of state control or aid, South Carolina, twelve days after the decision, spectacularly repealed approximately 130 statutory provisions affecting the primary process, and subsequently amended the state constitution.[50]

43. 321 U. S. 649 (1944).
44. Nixon v. Herndon, 273 U. S. 536 (1927).
45. Nixon v. Condon, 286 U. S. 73 (1932).
46. Grovey v. Townsend, 295 U. S. 45 (1935) (no state action).
47. Based on § 2: see note 2 *supra.*
48. "If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, . . . it endorses, adopts and enforces the discrimination against Negroes practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is State action within the meaning of the Fifteenth Amendment. . . . This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination. . . ." Smith v. Allwright, 321 U. S. 649, 664 (1944). The Court cited some 59 separate Texas statutes which in varying degrees regulated the primary process. *Id.* at 653-6. *Cf.* United States v. Classic, 313 U. S. 299 (1941) (where state statute required primary be conducted by state officials and made it a state election rather than a purely party election, fraudulent acts of election officers in federal election were subject to federal prosecution based upon Art. 2, § 4 of Constitution). *See also* Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. 2d 212 (C. C. A. 4th 1945) (action of board of trustees of free city library set up by private donor and partially financed by city in discriminatorily refusing to consider a negro for employment held unconstitutional under 14th Amendment).
49. See Note, *Negro Disenfranchisement—A Challenge to the Constitution,* 47 COL. L. REV. 76, 78-80 (1947).
50. *Id.* at 80-82.

A federal district court has recently declared voting discrimination in South Carolina primaries unconstitutional even in the absence of state regulating laws on the books, on the theory that the old laws were still in force by custom and usage.[51]

Finally, paralleling the South Carolina decision on primary voting, is the recent attempt to extend *state action* to include a landlord's discriminatory rental policy. Suit has been brought in New York to enjoin the refusal to rent to negroes by the 90 million dollar Stuyvesant Town apartment housing project of the Metropolitan Life Insurance Company.[52] The theory is that, since the municipality has passed a statute granting to the project certain tax exemption and government assistance by eminent domain, the housing project so regulated has become imbued with a governmental character so as to render the rental discrimination unconstitutional *state action.* From a purely logical point of view both the New York and South Carolina cases represent extensions of *state action* to the breaking point.

IV. Individual Action Sanctioned by the State

Where the color of authority theory cannot be invoked to label the abridgment of a protected right *state action,* because state-given power or state-provided or regulated machinery is not used, a different theory has been evolved to achieve the same end—state sanction. The state sanction theory primarily operates where the nature of the discriminatory act under consideration is concededly private but (1) the act as carried out is subsequently upheld by a state court, or (2) the act as contemplated is made capable of accomplishment only through the aid of positive court action. In either case it is said the private act in effect becomes *state action* when the state court endorses it.

The state sanction argument has arisen largely in cases involving racial restrictive covenants to land. Where a covenant that land shall not be sold to negroes or some other racial minority attaches to a deed or is agreed upon separately and recorded by neighboring landowners, and the landowner or his successor breaks the covenant by selling to a negro, interested parties have usually been allowed to enforce the covenant and oust the negro, purely as a matter of property law.[53] The Constitution has not been thought to be involved in what was apparently a purely private contract. But, based upon early dictum[54] and a California de-

51. Elmore v. Rice, 72 F. Supp. 516 (E. D. S. C. 1947) (declaratory judgment allowed negro against private election officials who denied him right to vote in state party primary). Another theory of attack on the South Carolina plan is to consider the action of the legislature in repealing the laws regulating primaries as state action in itself effecting a deprivation of an already possessed and inherent right to vote. See Note, 47 Col. L. Rev. 76, 86-7 (1947).

52. The lower court on July 28, 1947, denied an injunction against the discrimination on the ground that the project is not public but private, although serving a "public use" in rehabilitating city housing. Dorsey v. Stuyvesant Town Corp., 74 N. Y. S. 2d 220 (Sup. Ct. 1947).

53. Queensborough Land Co. v. Cazeaux, 136 La. 723, 67 So. 641 (1915). See Miller, *Race Restrictions on Ownership or Occupancy of Land,* 7 Law. Guild Rev. 99-102 (1947). In general, see Van Hecke, *Zoning Ordinances and Restrictions in Deeds,* 37 Yale L. J. 407 (1928); Bruce, *Racial Zoning by Private Contract in the Light of the Constitutions and Rule Against Restraints on Alienation,* 21 Ill. L. Rev. 704 (1927).

54. *See* Smoot v. Kennedy Central Ry., 13 Fed. 337, 344 (C. C. Ky. 1882) (discriminatory action by railroad not state action where suit brought originally in federal court).

cision involving a covenant against Chinese,[55] and nurtured by the Supreme Court's unequivocal stand against racial restrictive zoning statutes,[56] the sanction theory was advanced for the first time to the Court in 1926 in order to strike down the enforcement of a restrictive covenant as unconstitutional. In *Corrigan v. Buckley*[57] the matter had come before a lower federal court in the District of Columbia on suit by one party to a covenant to enjoin another party's performance of a contract for the sale of land to a negro. When the injunction was granted the decision was appealed, partially on the ground that the lower court's decree itself deprived the defendants of due process under the 5th and 14th Amendments. The Court, however, refused jurisdiction, citing the *Civil Rights Cases* for the proposition that the amendments were aimed at acts of the state and not of the individual.[58] Subsequent decisions, citing *Corrigan v. Buckley,* have consistently ignored the state sanction argument and upheld restrictive covenants.[59]

The fight against restrictive covenants, however, is raging again,[60] stimulated by the war-induced housing shortage and an increased concern over civil rights;[61] moreover, a Supreme Court decision is imminent.[62] State sanction advocates today are relying heavily on the line of decisions growing out of the original interpretation in *Virigina v. Rives*

55. Gandolfo v. Hartman, 49 Fed. 181 (C. C. S. D. Cal. 1892). "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the Courts may enforce." *Id.* at 182. See note 56 *infra.*

56. Buchanan v. Warley, 245 U. S. 60 (1917). The theory that what the legislature will not be allowed to accomplish constitutionally by enacting a discriminatory statute the courts should not be allowed to accomplish by judge-made law is commented upon in Part V *infra;* see also Part II and note 23 *supra.* An interesting correlative was posed in Prudential Insurance Co. of America v. Cheek, 259 U. S. 530 (1922) to the effect that since the discriminatory conduct (employers' agreement not to re-employ each other's dischargees) could have constitutionally been prohibited by statute the same thing could be established by court decision.

57. 271 U. S. 323 (1926).

58. Since the case originated under the law of the District of Columbia the constitutional argument would necessarily invoke the 5th Amendment, not the 14th. The analogy between federal laws as federal action under the due process clause of the 5th Amendment and state laws as state action under the due process clause of the 14th Amendment is obvious. Considerable attempt has been made, with legal justification, to distinguish *Corrigan v. Buckley* on the grounds that the case came up on appeal, not certiorari, based on the theory primarily that the covenants were void in themselves, and that it was to this theory and not the court enforcement sanction theory that the Court addressed itself. See Miller, *supra* note 53, at 102-4; McGovney, *supra* note 32, at 34-6.

59. ROTTSCHAEFER, *op. cit. supra* note 6, at 526-7; Miller, *supra* note 53, at 104-5. *Contrast* a recent Canadian decision, *Re* Drummond Wren, [1945] 4 D. L. R. 674 (Ont. H. C.) (restrictive covenant void as against public policy, the Atlantic Charter and the United Nations Charter). Some courts have attempted to distinguish occupancy from ownership, proscribing restrictions on the latter only, but the distinction is without a practical difference.

60. See in general Miller, *supra* note 53; McGovney, *supra* note 32; Note, *Anti-Discrimination Legislation and International Declarations as Evidence of Public Policy Against Racial Restrictive Covenants,* 13 U. OF CHI. L. REV. 477 (1946). Note Edgerton, J., dissenting in Hurd v. Hodge, 162 F. 2d 233, 235 (App. D. C. 1947). See also REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 68-70 (Gov't Print. Off. 1947); recommendation V-4 of the Report urges attack by the Department of Justice on restrictive covenants through the courts, and the Department is appearing as *amicus curiae* in the cases at present before the Court. See cases cited *supra* note 5.

61. See the report of the President's committee, cited *supra* note 60.

62. See note 5 *supra.*

that *state action* includes state judicial action. As indicated, the decisions have developed the theories that a court can, by decision alone, deprive an individual of due process, either procedurally or as a matter of substantive law.[63] Particular reliance is placed upon recent substantive due process decisions involving freedom of religion and speech. In one such decision, *Marsh v. Alabama*,[64] a state criminal statute against trespassing on private property had been invoked in a state court against a Jehovah's Witness who was distributing literature on the public streets of Chickasaw, Alabama, a private corporation town owned entirely by the Gulf Shipbuilding Company. The Supreme Court reversed the conviction on the ground that the state court's decision effected a denial of freedom of speech and religion, contrary to the 1st[65] and 14th Amendments.[66] Similarly, in *American Federation of Labor v. Swing*,[67] a state common law policy against picketing was invoked by injunction against a union. The Supreme Court reversed, declaring that the effect of allowing the injunction was to deprive the union employees of freedom of speech.[68]

Both the *Marsh* and *Swing* cases involved positive state court action affirmatively effecting the abridgment of a protected right. In the *Marsh* case the property owners wanted to prevent the exercise of the individual's freedom of religion; in the *Swing* case the employer wanted to prevent the exercise of the employee's freedom of speech. In both, the state court lent its aid, by criminal conviction and by injunction respectively, to the carrying out of an essentially private action. Moreover, had the private action already been accomplished and the victim been seeking redress by way of damages, it would seem to follow that a state court refusal to grant such redress would similarly have constituted *state action* sanctioning the private abridgment of a protected right.[69]

But what if there had been no court action at all, no direct sanction of a private action? Would private infringement of a protected right amount to *state action* merely because of the state's failure to prevent the wrong from occurring? The idea of *state inaction* as *state action* has occurred to legal writers recently,[70] particularly in connection with a proposed federal anti-lynching bill.[71] In the cases both of lynchings and of the systematic invasion of the right to vote by private terroristic groups like the Ku Klux Klan, the private wrongdoers are not available to be sued. Hence, the ordinary legal remedy of civil suit is inappropriate and it is thought that positive state protection by enacting and enforcing special criminal laws is necessary to protect the individual's constitutional rights.

63. See Part II and notes 22 and 23 *supra*.

64. 326 U. S. 501 (1946).

65. The protection offered by the 1st Amendment against the federal government has been extended to apply by implication in the 14th Amendment as against the states. *See* Schneider v. State, 308 U. S. 147, 160 (1939).

66. *See also* Bridges v. California, 314 U. S. 252 (1941) (state court conviction for contempt of newspaper editor and publisher for publishing adverse comments about pending court decision held unconstitutional deprivation of freedom of speech); Cantwell v. Connecticut, 310 U. S. 296 (1940) (state court conviction of Jehovah's Witness for the common law breach of peace held unconstitutional deprivation of freedom of religion).

67. 312 U. S. 321 (1941).

68. *See also* Bakery Drivers Local v. Wohl, 315 U. S. 769 (1942) (state court injunction against picketing held deprivation of right to free speech).

69. There are apparently no important litigated cases on this point as yet, but in view of the holdings cited in notes 64, 66 through 68, there ultimately should be.

70. See Note, 47 COL. L. REV. 76, 87-88 (1947).

71. See KONVITZ, *op. cit. supra* note 3, c. 4; Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627, 636-9 (1946).

It is urged that persistent failure by states to accord that protection, if viewed as *state action,* would provide constitutional basis for federal enforcement legislation under the enabling clauses of the Amendments.[72]

V. Evaluation

The gradual extension of the concept of *state action,* which appears still to be progressing today, has rendered impossible the satisfactory application or use of the concept as a guide; a redefinition seems desirable.

Of course the state legislature can make law; consequently, there is no difficulty with the basic proposition that a state law as enacted or directly carried out will absolutely afford constitutional grounds for federal court jurisdiction when it abridges a right protected by the 14th and 15th Amendments.[73] Such would be a statute denying a negro the right to vote.

When that negro, however, is denied his right to vote by the act of an individual not authorized so to act by state law, whether the individual is acting under color of authority or not, it cannot be said that the state has taken away the negro's right. The state has not acted—yet. The negro's remedy for this purely private wrong is to go to his state court. The Constitution, with a few necessary exceptions, left the regulation by law of the individual to the states.[74] Consistently therewith, the individual should not be permitted to turn to the federal courts unless his rights under the Constitution have been abridged by state law or are irremediable under state law.[75]

Now, if the state court refuses to enforce the negro's right to vote, the state *has* acted because the state court has made law. Where formerly there was no state law in existence having the effect of denying the negro the right to vote, there now is. The state court decision does not, as opponents of state sanction argue,[76] simply decide the issue between plaintiff and defendant and go no further. Every decision of a court in a common law stare decisis system necessarily either follows established law, changes established law, or makes law ab initio. Some decisions, naturally, will be more susceptible of generalization into rules of law applicable in future similar fact situations, while others will be limited narrowly by their own special factual background; but all will be law. It follows that all state court decisions will constitute *state action* by sanction, although not all will infringe a protected constitutional right.[77] It seems apparent, therefore, that those decisions of federal courts, rendered as a matter of *original jurisdiction* without prior state court determination, which have found *state action* where there was merely color of authority for the discriminatory act, have not only made *state action* impossible of dependable

72. On two possible theories. First, that the culpable negligence of state officials in failing to prevent the crimes is state action and the officials themselves are punishable. Konvitz, *op. cit. supra* note 3, at 77. Second, that the state's mere toleration of the crimes is tantamount to lending a hand in their commission and thus the private wrongdoers themselves are punishable as state representatives. Hale, *supra* note 71, at 636-9. This latter theory comes close to saying that every act of a private individual is state action merely because the state does not actively forbid it.

73. See Part II and note 23 *supra.*

74. See Part II and notes 6, 7 *supra.*

75. An excellent discussion of the technical grounds for federal jurisdiction in this respect is presented in Note, *Supreme Court Review of State Court Questions Involving Multiple Questions,* 95 U. of Pa. L. Rev. 764 (1947). See also Note, *Recent Supreme Court Limitations on Federal Jurdisction,* 53 Yale L. J. 788 (1944).

76. See Van Hecke, *supra* note 53, at 411.

77. See discussion in note 23 *supra.*

definition but have also done damage to the constitutional system. This is especially true when there is immediate resort to the federal court for the redress of grievances arising out of prohibitions enunciated in the Amendments, as in the *Home Tel. & Tel.* and *Raymond* cases.[78] It would also seem true when the resort to the federal court is based upon the provisions of some enabling act of the Amendments, as in *Smith v. Allwright.*[79]

But what if there can be no private litigation and hence state court sanction will not occur? Sanction by state court decision as a prerequisite to federal review can help little where the infringement of individual rights is accomplished criminally with no resort to private litigation feasible. In the case of lynchings and of Ku Klux Klan terrorism, the enforcement aspects of the Amendments appear the only remedy and here federal legislation seems necessary.[80] The persistent failure of a state to protect an individual's rights where the individual has no civil remedy would appear to be such gross omission as to amount to sanction of the wrong. The writers of the Amendments foresaw the need for positive enforcement legislation and inserted enabling clauses. Overemphasis of federal law enforcement in intrastate matters will admittedly undermine constitutional theory, but is necessary for actual survival if the states forsake their role as primary law makers. Perhaps the threat of a federal anti-lynching bill will make the states "see the light."

While redefinition of state action to include state court sanction as well as legislative action will, from a constitutional point of view, solve the difficulty inherent generally in the color of authority cases—except possibly in the special case of lynchings—it will not, however, resolve the *basic* question inherent in all alleged discrimination cases, especially those involving restrictive covenants. The determination of the existence of state action is a preliminary problem only, and must be followed by a determination as to which of several conflicting rights is to be protected. If the state court sanction of the action of the private party in denying the negro his right to vote is condemned by the Supreme Court as unconstitutional *state action,* no other individual's right is infringed. This would appear true if a state court sanctioned discrimination in voting primaries. But in the typical restrictive covenant case, while the right of a negro not to be discriminated against might be protected by a state court's refusal to enforce the restrictive covenant, the state court's action would correspondingly infringe the property owner's freedom of contract and property rights. Conversely, legal recognition of the restrictive covenant might, in cases where the property owner subsequently finds it economically desirable to sell to negroes and therefore wants to change his mind, actually limit the property owner's freedom. Admitting that an individual can contract away his freedom to change his mind, it is to be noted that in this case other individuals will have an interest—even a constitutional right—in his freedom, namely negroes who need housing.[81] Moreover, it would appear clear that the entire public, whites and negroes

78. See Part III and notes 40 and 41 *supra.*

79. See Part III *supra* and note 80 *infra.*

80. See § 5 of the 14th Amendment and § 2 of the 15th Amendment. The development of federal civil rights statutes, both civil and criminal, to enforce the Amendments is well outlined in KONVITZ, *op. cit. supra* note 3, at 29-106 *passim.* Federal law enforcement will necessarily affect individuals, either culpable state officials or the private wrongdoers themselves. See note 72 *supra.* The Supreme Court has traditionally been reluctant to allow such an extension of federal authority. KONVITZ, *op. cit. supra* note 3, at 103.

81. Hale, *supra* note 71, at 634-5.

alike, has a very definite interest—or even a constitutional right—that public health not be jeopardized by the unavailability of decent housing for negroes.[82] A similar analysis could be made of the *Stuyvesant Town* case.

It appears, therefore, that resolution of the type of problem presented by the cases discussed above cannot be effected alone by a determination of the existence or non-existence of *state action,* since the ultimate decision of the constitutional issue will hinge upon a balance struck between several interests, public and private. However, the cases involving purely *private litigants* pose the problem of meeting at least the first hurdle, a finding of *state action* of some variety, if constitutional requirements are to be met. Any advantage in permitting federal courts, with a uniform interpretation of civil rights, to decide in the first instance which of several private interests shall prevail, should not outweigh the desirability of leaving to the states, in conformity with constitutional theory, at least a first opportunity to make a determination of this issue of discrimination. When this has been accomplished through legislation or through court holding, only then should federal power attach.

W. J. F.

82. See Brief for Petitioners, pp. 70-72, Hurd v. Hodge, 162 F. 2d 233 (App. D. C. 1947).